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IN THE

Supreme Court of the United States

October Term, 1986

EIDAL INTERNATIONAL CORPORATION,
PETITIONER
V.
RICHARD GARCIA, ET AL., RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the appellate court decision in this case is in direct conflict with *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983).

2. Whether the appellate court erred in not applying the six month statute of limitations adopted in *DelCostello* to this case.

3. Whether the labor law policies that persuaded the Court in *DelCostello* to adopt a six month statute of limitations apply where the employer has allegedly repudiated the collective bargaining agreement.

4. Whether the appellate court decision undermines the strong preference of Congress and this Court for contract grievance procedures as the preferred method for settling labor disputes by declining to apply *DelCostello*.

5. Whether the appellate court decision below is in conflict with other circuit court decisions such as *McCreedy v. UAW Local No. 971*, 809 F.2d 1232 (6th Cir. 1987), *Lacina v. G-K Trucking*, 802 F.2d 1190 (9th Cir. 1986) and *Farr v. H.K. Porter*, 727 F.2d 502 5th Cir. 1984) which have applied *DelCostello* without hesitation to §301 claims brought by individual employees against the employer over a plant closing.

LIST OF PARTIES

Plaintiffs: Richard Garcia, Epifanio Velazquez, Robert Lee Aragon, Manuel Rito Chavez, Gregory Archibeque, J.W. Hamilton, Francis J. Bohensky, Dennis Earl Barela, Robert Gutierrez, Leroy Daniel Zamora, Richard Jaramillo, Mayo K. Ulibarri, Rudolph Saiz, Adelicio G. Herrera, Ivan Aragon, Richard D. McGuire, Carlos Benavidez, Ernest Trujillo, Miguel Delgado, Frank Sanchez, Alex Madrid, Delbert Davenport, Joe Lopez, Michael Bock, Kenneth Griego, Harvey West, Linda Poteet Minteer, John G. Rael, Herman Chavez, Robert Chavez, David Trujillo, Orlando Quintana, William H. Harrah, Christopher Garcia, Benjamin Aragon, Joseph N. Lepeska, Trinidad Barela, Sam Blea, Jimmy Reid, Thomas Wilson, Jr. and Steve Melton.

Defendants: Eidal International Corporation; Jencor International Corporation; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, Local Lodge No. 338; and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO.

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Tenth Circuit Court of Appeals is reported at 808 F.2d 717 (10th Cir. 1986).

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1986. A timely petition for rehearing was filed by petitioner on January 13, 1987. An order denying the petition for rehearing was entered on March 12, 1987. The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

STATUTES INVOLVED

This case involves §301 of the Labor Management Relations Act, 29 U.S.C. §185, and §10(b) of the National Labor Relations Act, 29 U.S.C. §160(b). The statutes are reproduced in the appendix.

STATEMENT OF CASE

1. Plaintiffs are former employees of petitioner Eidal International Corporation ("Eidal"). Plaintiffs brought suit in federal district court against Eidal and Jencor International Corporation ("Jencor") for breach of contract and against the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, Local Lodge No. 338 and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, ("the union") for breach of its duty of fair representation. The suit was filed on January 31, 1984. Jurisdiction was based on §301 of the Labor Management Relations Act, 29 U.S.C. §185, and 28 U.S.C. §1337. Plaintiffs filed an amended complaint on February 16, 1984, adding five new plaintiffs.

2. Eidal and the union's local lodge were signatories to a collective bargaining agreement entered into on August 2, 1981. (Appendix ex. 7; exhibit A to the complaint). Eidal manufactured heavy duty trailers in Albuquerque, New Mexico. In July 1982 it closed its manufacturing operation and transferred it to Jencor. All employees were terminated. Plaintiffs' complaint against Eidal, Jencor and the union arises under the bargaining agreement and concerns their termination.

3. Under the collective bargaining agreement Eidal reserved the right to relocate or close the business unit provided notice and an opportunity for discussion was given to the local lodge (Appendix ex. 7; Article 2, Section 2.1(d) of Exhibit A).

4. After negotiations with union representatives, Eidal notified all of its employees in a letter dated July 22, 1982 that it was closing its Albuquerque, New Mexico plant. (Appendix ex. 7; Exhibit B to the complaint). Eidal termi-

nated all employees and transferred its manufacturing operations to Jencor. Eidal advised the employees in the letter that it had arranged to provide the union with a sum of money to be distributed on the basis of seniority and to continue insurance benefits for thirty days.

5. Adelicio Herrera, one of the plaintiffs, filed unfair labor practice charges against Jencor and the union shortly after his termination. In his charge against the union (Case No. 28-CB-2025) plaintiff Herrera claimed the union entered into an illegal agreement with Jencor on or about July 17, 1982 because the employer had no employees in the bargaining unit. (Appendix ex. 8). In his charge against Jencor (Case No. 28-CA-7103) plaintiff Herrera claimed Jencor entered into an illegal agreement with the union and that Jencor discriminatorily failed and refused to hire him because of his union activities. (Appendix ex. 9). Both claims were predicated on allegations that the arrangement between Eidal and Jencor was a sham. The agreement between Jencor and the union was nullified in settlement agreements signed by Herrera, the union and Jencor (Appendix exs. 10 and 11), but the National Labor Relations Board found no merit in the other claims of plaintiff Herrera. (Appendix exs. 12 and 13).

6. Eighteen (18) months after their grievance arose, Plaintiffs filed suit. Plaintiffs alleged in the complaint that their termination by Eidal was a breach of the collective bargaining agreement. Plaintiffs further alleged that Jencor was either an alter ego of Eidal or a successor which was bound by the collective bargaining agreement. Plaintiffs also alleged that their discharge was wrongful.

7. Plaintiffs allege that the union condoned, acquiesced and conspired in Eidal's breach of the collective bargaining agreement and breached its duty of fair representation by failing to challenge the propriety of Eidal's actions, to keep

its members informed about those actions, to bargain in good faith with Eidal and by entering into an illegal pre-hire contract with Jencor.

8. Eidal and Jencor filed timely motions to dismiss in the district court action. They argued that plaintiffs' complaint was time-barred under the six month statute of limitations adopted in *DelCostello*. The union timely answered the complaint and later filed a motion to dismiss the complaint as time-barred under *DelCostello*.

9. The district court issued a memorandum opinion and entered an order on September 4, 1984 granting the three motions to dismiss. The district court held that 29 U.S.C. §160(b) and *DelCostello* barred plaintiffs' complaint. The district court declined to exercise jurisdiction over the remaining pendent state claims.

10. Plaintiffs filed a timely notice of appeal. The court of appeals entered its decision on December 30, 1986 which reversed the district court decision and remanded the case for further proceedings. The court of appeals concluded that the holding of *DelCostello* did not extend to cases in which an employer has repudiated all of its obligations under a bargaining agreement, including the duty to arbitrate.

ARGUMENT

The characterization of the present case by the court of appeals is antithetical to the decision issued by this Court in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983). The appellate court improperly equated a breach of contract claim with contract repudiation. Their decision, if left intact, effectively overrules *DelCostello*.

The appellate decision ignores the long standing federal labor law goal of rapid resolution of disputes within the

collective bargaining framework. Instead, the decision extends the limbo period in which labor disputes remain unresolved and undermines the contractual grievance process favored by Congress and the courts. The final result is to prolong the very litigation which *DelCostello* brought within the six months limitation period of §10(b) of National Labor Relations Act, 29 U.S.C. §160(b). Petitioner Eidal requests that the Court accept this petition and clearly define the parameters of *DelCostello* when litigation is initiated by employees against their employer and union.

POINT I

THE APPELLATE COURT IMPROPERLY CHARACTERIZED THE COMPLAINT AND THEREBY IS IN DIRECT CONFLICT WITH DELCOSTELLO.

In *DelCostello*, the Court was called upon to determine what statute of limitations should apply to actions brought under §301 of the Labor Management Relations Act, 29 U.S.C. §185, where an employee sues his employer for a breach of the collective bargaining agreement and also his union for breaching its duty of fair representation by mishandling his grievance. The Court held that the six months limitations period of §10(b) of the National Labor Relations Act was the applicable statute of limitations governing the suit, both against the employer and the union.

In analyzing the cases, the Court found that the indispensable predicate for an employee §301 claim against the employer was proof that the union had breached its duty of fair representation. Often referred to as a hybrid action, Justice Stewart in *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981) defined the nature of such an action: "To prevail against either the company or the union . . . [employee-

plaintiffs] must not only show that their discharge was contrary to the contract, but must also carry the burden of demonstrating breach of duty by the union." *Mitchell*, 451 U.S. at 67, *quoting Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-571 (1976).

No case before *DelCostello* had provided the Court with a suitable guide from which to borrow a statute of limitations. The Court recognized that claims raised in *DelCostello* amounted to a direct challenge to the private settlement of disputes under the bargaining agreement. *DelCostello*, 462 U.S. at 165. The Court also perceived that competing interests were at stake; namely a national interest in stable bargaining relationships and finality of private settlements, and an employee's interest in challenging wrongful conduct on the part of his employer and union. *Id.* at 171. To accommodate a balancing of these interests in the context of §301/ fair representation litigation, the Court settled on the six months limitations period of §10(b).

In the present case, the court of appeals refused to characterize the action as a hybrid, despite the presence of claims by individual employees against both the employer for breach of the collective bargaining agreement and against the union for breach of its duty of fair representation. Instead, the appellate court found the case more analogous to a straightforward breach of contract action. It declined to apply the *DelCostello* six month limitations period, opting instead to apply an appropriate state statute of limitations period. The appellate court reversed the district court's order granting defendants' motions to dismiss and remanded the case for further proceedings.

The appellate court's decision is based on the distinction that Eidal repudiated the entire bargaining agreement, including its duty to arbitrate. (Appendix ex. 1 at pages 2a and 7a). The appellate court reasoned that an employer's total repudiation of a bargaining agreement is a unilateral act

which does not require proof that the union has also breached its duty of fair representation.

Initially, it should be noted that the complaint did not allege that Eidal repudiated the contract. Rather, the complaint states that the plant closing, plaintiffs' termination, and the transfer of manufacturing operations was a breach of contract by Eidal and that the union condoned, acquiesced and conspired in the breach. The complaint, moreover, does not allege that Eidal refused to participate in the contractually allowed grievance procedures under the bargaining agreement or that plaintiffs tried to invoke the contractual grievance procedures. In every count of the complaint, except for that which alleges that the union breached its duty of fair representation, *both* the employer and the union are sought to be held responsible for plaintiffs' terminations. On this basis alone, the appellate court was remiss in not affirming the district court which had held that the complaint was time-barred under *DelCostello* and §10(b).

The court of appeals relied on two allegations in the complaint to support its finding that repudiation was well pled (Appendix ex. 1 at pages 8a and 9a). The appellate court first pointed to the July 1982 letter attached to the complaint as Exhibit B which announced to all employees that Eidal was closing its plant and transferring its manufacturing operations. The court of appeals inferred from this letter that Eidal effectively was announcing an end to contractual relations. The court apparently concluded that the letter could support an inference of repudiation.

The second allegation cited by the appellate court was that the transfer of Eidal's manufacturing operations to Jencor was a sham and that the two companies were actually the same employer. In the appellate court's view this allegation, combined with the inference drawn from the July 1982 letter, described with sufficient particularity a sham transaction that constitutes a repudiation.

A. THE APPELLATE COURT ERRONEOUSLY EQUATED A BREACH OF CONTRACT CLAIM WITH CONTRACT REPUDIATION.

The bargaining agreement gave Eidal the express right to close the plant, free from a duty to submit its decision to arbitration. The signatories to the bargaining agreement, Eidal and the local union lodge, agreed that Eidal retained the right during the term of the agreement to unilaterally make a decision to close its plant. Section 2.1 of the agreement provided:

> 2.1 It is mutually recognized and agreed by the company and the union that, except as abridged, delegated, granted or modified specifically by this Agreement or any supplementary agreements that may be hereinafter made, all of the rights, powers, and authority the company had prior to the signing of this or any preceding agreement are retained by the company, and remain exclusively and without limitation with the rights of management. The union recognizes that the company has and retains the exclusive right to manage its business and all its actions and concerns except as expressly limited in this Agreement. The exercise of these rights, powers and authority retained by the company are not subject to the grievance procedure except as hereinafter specifically provided or as might be expressly limited by some specific provision elsewhere in this Agreement.
>
> Without limiting the generality and purpose of the foregoing provision, this includes but is not limited to:
>
> * * *
>
> (d) The location of the business, including the establishment of new business units, and the relocation or closing of the present business unit, provided that notice is first given and opportunity for discussion is provided to the union upon proposal to relocate or close the present operations.

(Appendix ex. 7; Article II, Section 2.1 of Exhibit A). Eidal had the authority under the bargaining agreement to close the plant, but it was required to give notice and an opportunity for discussion to the union about the proposal to close the plant.

The July 1982 letter alone cannot serve as an inference of repudiation for three reasons. First, Eidal had the right under the bargaining agreement to close its plant. The decision to close and its implementation was contractually permitted. Eidal was required though to give notice to the union. Section 2.1(d) of the bargaining agreement directed Eidal to give notice only to the union. Plaintiffs can only complain that the union did not have notice or a chance for discussion. Eidal had no duty to give every employee notice and an opportunity for discussion. Any failure on the part of Eidal to give notice to every employee does not state a claim for breach of the bargaining agreement or, more specifically, allege a repudiation of the bargaining agreement.

Second, the complaint does not allege that the union was unaware of Eidal's decison to close the plant or that the union did not have an opportunity for discussion on the decision to close the plant. To the contrary, in their claim against the union, the plaintiffs alleged that the union breached its duty of fair representation 1) by failing to bargain in good faith with Eidal regarding the sale of the bargaining unit functions to Jencor; 2) by failing to vigorously assert and protect the rights of the employees in connection with the sale; and 3) by conspiring with Eidal and Jencor to cause Plaintiffs to lose their employment. (Appendix ex. 7; Count II, paragraph 5 (a, b, i)). Plaintiffs also alleged in the complaint that the layoffs leading up to the July 22, 1982 letter and their terminations were part of a preconceived scheme in which the union condoned, acquiesced and conspired. (Appendix ex. 7; Count III, paragraph 3; Count IV, paragraph 2).

Furthermore, Plaintiffs alleged in their complaint that the union had signed an illegal pre-hire agreement with Jencor that the National Labor Relations Board later nullified. (Appendix ex. 7; Count II, paragraph 5(h)). The date of the alleged illegal agreement preceded Eidal's July 22, 1982 termination letter. (Appendix exs. 8-11). Plaintiffs by their own complaint have alleged that the union knew of the closing, conceded to it and was trying to bind the next employer to a new collective bargaining agreement.

The third and perhaps most important reason why the July 1982 letter does not support an inference of repudiation is that a breach of a contract claim is not the same as a repudiation of the contract. Eidal by exercising a right it had under the bargaining agreement cannot be deemed to have repudiated the agreement. At best plaintiffs can only complain that Eidal exercised its contractual right to close the plant improperly by not giving the union notice and a chance for discussion. It is unreasonable to conclude, as the appellate court did, that by closing the plant pursuant to its contractual right Eidal also repudiated the agreement. Otherwise, *DelCostello* would never apply to a plant closing where an allegation of repudiation is made.

The July 1982 letter explains the arrangement that Eidal had made with the union to distribute a sum of money to all employees with tenure of more than three years and to continue insurance benefits for the next thirty days. The payment of money through the union and continuation of insurance benefits are inconsistent with an inference of repudiation. The reasonable inference drawn from those statements in the letter is that discussions had taken place between Eidal and the union.

Plaintiffs purposely and necessarily linked their claim against Eidal to their claim against the union. Eidal was not

obligated under the bargaining agreement to give each individual employee notice and an opportunity for discussion regarding the decision to close the plant. Eidal was only obligated to inform the union. The complaint alleges and record reflects that the union knew about the decision to close the plant. The claim pled against Eidal necessarily depends upon proof concerning the nature of the union's discharge of its duty of representation.

Under *DelCostello*, Plaintiffs had six months to bring suit and failed to do so. The district court reviewed the complaint and could not draw any reasonable inferences which would defeat the motions to dismiss. It properly ruled that the six months limitations period of *DelCostello* applied and dismissed Plaintiffs' complaint as time-barred.

The appellate court struggled to avoid this result. It excused the union complicity alleged by plaintiffs as an explanation why plaintiffs sued individually. That reasoning does not explain why *DelCostello* is inapplicable.

At best union complicity excused plaintiffs from resorting to the contractual grievance process. Any other explanation ignores the relationship between the union and its members. Members must afford the union the opportunity to act on their behalf. *Republic Steel v. Maddox*, 379 U.S. 650 (1965). In the present case the bargaining agreement appointed the union as plaintiffs' representative and established a uniform and exclusive method for orderly settlement of grievances. Plaintiffs were obligated to follow the contractual grievance process, but filed a lawsuit instead.

The appellate court's refusal to characterize the present case as a hybrid action is unsound. It is a characterization that serves only to avoid the strictures of *DelCostello* and substantially extend the time within which to resolve

disputes in derogation of a long standing labor policy to the contrary.

B. AN ALLEGATION OF A SHAM TRANSACTION REINFORCES THE APPLICABILITY OF DELCOSTELLO.

The appellate court was particularly intrigued with the notion of a sham transaction. (Appendix ex. 1 at page 7a). Plaintiffs alleged in their complaint that Eidal and Jencor were alter egos and in essence the same employer. Therefore, Jencor remained bound by the bargaining agreement. (Appendix ex 7; Count I, paragraph 7). Alternatively, plaintiffs allege Jencor was a successor to Eidal and bound by the bargaining agreement. (Appendix ex. 7; Count II, paragraph 9). Eidal does not concede that either allegation is true, but will assume they are for purposes of this argument.

Plaintiffs' contention under either scenario is that Eidal (now called Jencor) remained subject to the collective bargaining agreement and that their termination, loss of benefits, and failure to be rehired was in breach of the bargaining agreement. (Appendix ex 7; Count I, paragraph 8). In plaintiffs' eyes, the transaction between Eidal and Jencor was a sham that was designed to reduce overhead at the expense of plaintiffs. (Appendix ex 7; Count I, paragraph 6).

Even if the allegations of sham transaction constitute a breach of contract and a repudiation, it is not a reason to avoid *DelCostello*. Under either the alter ego or successor scenario, plaintiffs were still required to afford the union the opportunity to act on their behalf and to attempt to submit their dispute to the grievance and arbitration procedure in the bargaining agreement. *Republic Steel v. Maddox*, 379 U.S. 650 (1965). As pointed out earlier, plaintiffs do not allege that they tried to invoke the grievance procedures or that Eidal (now called Jencor) refused to grieve. Instead, plain-

tiffs contend that the union either failed to press or only perfunctorily pressed their claims, and attempted to enter into a new bargaining agreement with Jencor. (Appendix ex 7; Count II, paragraph 5).

In *Vaca v. Sipes*, 386 U.S. 171 (1967) the Court found that conduct of an employer which amounts to a repudiation of exclusive contractual remedies allows employees to seek judicial review without pursuing the contractual procedures. *Id.* at 185. Likewise, an employee may seek judicial review directly if the union wrongfully refuses to process the grievance or improperly processes a grievance. *Id.*; *Hines v. Anchor Motor Freight, Inc.* 424 U.S. 554 (1976). At best the allegations of the complaint in the present case excused plaintiffs from exhausting the exclusive contractual grievance and arbitration remedies, and permitted them to seek judicial enforcement of their contractual rights.

Under either plaintiffs' alter ego or successor scenario, an established and continuing relationship between management and labor was still present. The union continued to represent those employees still working for Eidal (now Jencor) under the bargaining agreement. The notion of repudiation in the present case does not destroy the balancing of interests at stake among the parties; that is, Eidal's and the union's interest in a uniform, final and rapid resolution of the dispute versus the fair opportunity for plaintiffs to vindicate their rights under §301 and the fair representation doctrines. The allegations of a sham transaction as pled do not excuse plaintiffs from the six month limitations period of *DelCostello*, but rather reinforce the characterization of this action as a hybrid within the parameters of *DelCostello*. This is the point which the appellate court misapprehended and which has turned the holding of *DelCostello* on its head. Eidal respectfully requests the Court to accept this Petition and set straight the conflict created by the appellate court decision.

POINT II

THE APPELLATE DECISION OVERTURNS FEDERAL LABOR LAW POLICIES REAFFIRMED IN DELCOSTELLO.

The rapid resolution of labor disputes has long been a leading federal policy in the area of labor law. The policy is most clearly stated in Section 10(b) of the National Labor Relations Act, where Congress has adopted a six month limitations period for unfair labor practice proceedings. The policy promotes the national interests in stable bargaining relationships and finality of private settlements. It also underscores the importance attributed to the private grievance procedures under a collective bargaining agreement which are at the very heart of the system of industrial self-government. *Steelworkers v. Warrier and Gulf Navigation Company*, 363 U.S. 574 (1960).

The grievance procedures in a bargaining agreement are designed to avoid disintegration of the relationship between an employer and union by establishing an orderly means of handling disputes which arise in the workplace. Not only are the procedures important, but so is the time it takes to invoke the procedures and complete the process. Congress and this Court have recognized that it is critical that disputes be resolved expeditiously and not left suspended in limbo for long periods. 29 U.S.C. §160(b); *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981).

The policy of rapid dispute resolution is not restricted to §10(b) proceedings. It extends to §301 actions as well. *E.g., DelCostello, supra; Mitchell, supra; International Union, United Automobile Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO v. Hoosier Cardinal Corporation*, 383 U.S. 696 (1966). Congress has expressly approved contract grievance procedures as a preferred

method for settling disputes. §203(d) Labor Management Relations Act, 29 U.S.C. §173(d).

The appellate decision in the present case is inconsistent with the goals of speed and finality in the resolution of labor disputes. In its decision the court of appeals limited these goals to situations where there is a continuing working relationship between management and labor (Appendix ex. 1 at pages 9a and 10a). It decided the goals did not apply where an employer repudiates the contract and closes his business. *Id.*

As discussed in Point I, *supra*, the soundness of the appellate court's conclusion that an allegation of repudiation was properly raised is highly suspect. Its reasoning that a well pled allegation of contract repudiation makes *DelCostello* inapposite is equally suspect. Moreover, the allegations of the complaint repeatedly state that a continuing working relationship remained between Eidal (now Jencor) and the union.

Assuming that plaintiffs stated a claim of contract repudiation and that at Eidal's instigation there was a total breakdown in contractual relations between Eidal and the union, important questions remain as to whether the federal labor law policies discussed in *DelCostello* still apply. The practicalities of labor relations require rapid and final resolutions of disputes for both sides. An employer needs to know that he can make a business decision under a bargaining agreement to relocate or close a plant and not be subject to litigation years later on grounds that the decision was a "de facto" repudiation of the contract. The union and its employees also have an interest in seeking immediate redress from a relocation or closing which is deemed to be in violation of the bargaining agreement. If there is not a prompt resolution of disputes in these circumstances, both the employer and the union remain subject to the vagaries of litigation

from disgruntled employees who object to the way they were treated as a result of the decision to close.

The appellate decision has far reaching consequences because it overturns existing labor policies and goals adopted by Congress and this Court which promote a rapid resolution of disputes. 29 U.S.C. §173(d); *e.g.*, *DelCostello*, *Mitchell* and *Hoosier*, *supra*. The decision is detrimental to employer, employee and union alike, who all have an obvious interest in immediate redress from disputes arising when a plant is closed.

These policy factors have been addressed by other circuit courts in a plant closing situation, and the decisions reached are in conflict with the position of the appellate court below. In *McCreedy v. UAW Local No. 971*, 809 F.2d 1232 (6th Cir. 1987), the employees brought an action claiming that the employer violated the bargaining agreement by not affording them transfer rights when it closed its plant. The employees also sued the union for breach of the duty of fair representation. The Sixth Circuit held that the plaintiffs' action was untimely under *DelCostello* in that they knew or should have known, more than six months before filing their action, that the employer was not going to honor certain provisions of the collective bargaining agreement, and that the union was not going to seek arbitration. *McCreedy*, *supra* at 1236-37.

Furthermore, the *McCreedy* court specifically found that the employer failed to abide by the grievance procedures written into the collective bargaining agreement. *McCreedy*, *supra* at 1237. The employer in *McCreedy*, in so acting, did what the court below in the instant case said Eidal allegedly did — refused to honor the grievance procedure by "repudiating" the contract. Nevertheless, the *McCreedy* court still required the union to bring its action

against the employer to compel arbitration within the six-month time period established by *DelCostello*.

Similarly, in *Lacina v. G-K Trucking*, 802 F.2d 1190 (9th Cir. 1986) (decided on the very same day as the instant case), the court of appeals for the Ninth Circuit ruled that the employees knew, or should have known, prior to six months before they filed their action, that no union action regarding the employer's closure of its facility was forthcoming. *Id.* at 1192. Accordingly, the court applied the six-month statute of limitations mandated by *DelCostello* to bar the plaintiffs' action. There, as here, the employees were or should be barred by the action or inaction of their union.

In *Farr v. H.K. Porter Co.*, 727 F.2d 502 (5th Cir. 1984), the plaintiff-employees claimed that their former employer's closure and subsequent sale of its facilities constituted a breach of the collective bargaining agreement, and that the union's failure to protect their rights during the events surrounding the closure and sale of the plant constituted a breach of the duty of fair representation. *Id.* at 502-503. The Court concluded that §10(b)'s six-month statute of limitations applied to those plaintiffs' claims and found that *Hoosier* was inapplicable. "Unlike the present case, *Hoosier* did not involve any agreement to submit disputes to arbitration, and the suit was brought by the union itself rather than the individual employee." *Id.* at p. 505, citing *DelCostello* 462 U.S. at 162.

While the court of appeals in the present case claimed that *Porter* was inapposite, the fact situations in both cases are strikingly similar. The union here had full knowledge of, and participated intimately in, the proceedings which resulted in Eidal's decision to close its plant — as is clearly indicated in the complaint. Accordingly, the appellate opinion below is at odds with the *Porter* case.

From the allegations of the complaint, it is clear that plaintiffs knew, or should have known, on July 22, 1982 or shortly thereafter of their alleged grievance against Eidal and the union. *DelCostello* recognized the need for an aggrieved employee to have a satisfactory opportunity to vindicate his rights, but shunned a limitations period which prolonged the resolution of disputes. This Court found that the six month limitations period properly balanced these interests. *DelCostello* adopted a single limitations period of six months for fair representation suits where an employee sues both his employer and his union. Plaintiffs did not file suit until eighteen months after their termination.

The need for a quick resolution of grievances raised in lawsuits filed by individual employees against their union and their employer is accentuated when the dispute arises out of a plant closing. It therefore is more appropriate to borrow the six month limitations period adopted in *DelCostello* rather than a state statute of limitations as plaintiffs urge. This Court said in *DelCostello* that "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking, we have not hesitated to turn away from state law." *DelCostello*, 462 U.S. at 172.

Plaintiffs have relied heavily on *Hoosier*, *supra*. The appellate court was persuaded to apply *Hoosier*, although the district court held that *DelCostello* controlled. It must be remembered that in *Hoosier* it was the union that brought suit against the employer for breach of contract, and not individual employees. There was no claim asserted against the union by individual employees. There also was no agreement between the employer and the union to submit disputes to arbitration.

In the present case, as in *DelCostello*, individual employees have brought claims against both the employer and the union. The dispute in this case is over a plant closing. There is a bargaining agreement which contains a provision giving the employer the right to close the plant. The agreement also contains a grievance procedure for disputes. The grievance procedure was applicable to a dispute over whether the union had notice and input into the decision to close. (Appendix ex. 1 at page 6a). The factual similarities between the present case and *DelCostello* sufficiently implicate the consensual process that federal labor law is designed to promote and which *DelCostello* sought to protect. By analogizing this case to *Hoosier*, the appellate court ran afoul of the national interests in speed and finality in dispute resolution and improperly extended the time to resolve the present dispute.

The Supreme Court has consistently taken positions which promote the national labor policy of rapid resolution of disputes. Even in *Hoosier* the Court eschewed a longer state statute of limitations in favor of a shorter one, in part because of the federal policy favoring the relatively rapid resolution of labor disputes. *Hoosier*, 383 U.S. at 707. The vitality of *Hoosier* in cases where employees sue their employer and their union is in serious question. This Court indicated in *DelCostello* that even if that action were considered as arising solely under §301, the objections to use of state law and the availability of a well-suited limitations period in §10(b) would call for application of the latter rule. *DelCostello*, 462 U.S. at 158, n. 12. The court of appeals in the present case revitalized *Hoosier* at the expense of uniformity, finality and the rapid resolution of labor disputes, which are the underpinnings of *DelCostello*. The Court should accept this appeal and hear full argument on why the characterization given this case by the appellate court should be reversed.

CONCLUSION

For the foregoing reasons, Petitioner prays for certiorari to be granted.

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APPENDIX

EXHIBIT 1

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RICHARD GARCIA, et al.,
Plaintiffs-Appellants,

v. No. 84-2255

EIDAL INTERNATIONAL CORPORATION, a foreign corporation; JENCOR INTERNATIONAL CORPORATION, a foreign corporation; and INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, LOCAL LODGE NO. 338, a labor organization, and INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, labor organization,
Defendants-Appellees.

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. Civ. 84-0142C)

Filed December 30, 1986

Douglas G. Voegler of Marchiondo & Berry, P.A., Albuquerque, New Mexico (H. Richard Blackhurst of Albuquerque, New Mexico, with him on the brief), for Plaintiffs-Appellants.

Joseph L. Werntz (Terry D. Farmer with him on the brief) of Moses, Dunn, Beckley, Espinosa & Tuthill, Albuquerque, New Mexico, for Defendant-Appellee Eidal International Corporation.

Thomas H. Marshall of Blake & Uhlig P.A., Kansas City, Missouri (Gerlad R. Bloomfield of Kool, Kool, Bloomfield & Hollis, P.A., Albuquerque, New Mexico; and Robert L. Dameron of Blake & Uhlig P.A., Kansas City, Kansas, on the brief), for the Union Defendants-Appellees.

Before McKAY, SEYMOUR, and MOORE, Circuit Judges.

SEYMOUR, Circuit Judge.

A number of former employees of Eidal International Corporation brought suit against Eidal, Jencor International Corporation, and the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers, AFL-CIO, and its affiliate, Local Lodge No. 38 (the union). The district court granted defendants' motion to dismiss on the ground that the suit was time barred under *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983). We reverse and remand, concluding that the holding of *DelCostello* does not extend to cases in which an employer has repudiated all of its obligations under a bargaining agreement, including the duty to arbitrate.

I.

In considering a motion to dismiss for failure to state a claim, the pleadings should be liberally construed, all well-pleaded factual allegations must be accepted as true, and all reasonable inferences must be drawn in favor of the plaintiff. *Swanson v. Bixler*, 750 F.2d 810, 813 (10th Cir.

1984). So construed, the amended complaint in this case alleges the following facts.

The terms and conditions of plaintiffs' employment with Eidal were governed by a collective bargaining agreement between Eidal and the union. In July 1982, one year after the bargaining agreement was signed and two years before it was to expire, Eidal notified its employees that the business had been sold to Jencor. A letter from Eidal's chairman announced the sale, discharged all of the company's employees, mentioned certain termination benefits, and referred the workers to Jencor for possible rehiring. Eidal did not transfer the bargaining agreement to Jencor, which installed a new work force on less favorable terms. Only a few former Eidal employees were rehired.

Eighteen months after the sale was announced, plaintiffs filed this action against Eidal, Jencor, and the Union under section 301 of the National Labor Management Relations Act (NLMRA), 29 U S.C. §185 (1982). Plaintiffs contended that the sale was a sham, that Jencor was merely Eidal's alter ego, and that Eidal had repudiated the collective bargaining agreement by acting for the sole purpose of evading its contractual obligations. Plaintiffs further asserted that Eidal wrongfully discharged them in connection with the transaction. Plaintiffs also alleged that the union had violated its duty of fair representation because it failed to challenge the propriety of the transaction, failed to inform its members about the sale, and signed a pre-hire agreement with Jencor that the National Labor Relations Board (NLRB) later nullified. The complaint charges that Eidal acted unilaterally in severing all relations under the bargaining agreement, although it also alleges that the union acquiesced. Plaintiffs also asserted several violations of state law.

The district court granted defendants' motion to dismiss the action as time barred. The court characterized plaintiffs'

lawsuit as a hybrid action within the meaning of *DelCostello*, declined to exercise its jurisdiction over the pendent state law claims, and dismissed the complaint. Plaintiffs appeal contending that because Eidal wholly repudiated the collective bargaining agreement, including its duty to arbitrate, the suit is governed by the state limitations period for breach of contract, and that *DelCostello* is inapposite.

II.

No federal statute of limitations is specifically provided for section 301 actions. *DelCostello*, 462 U.S. 151, established that the six-month statute of limitations contained in section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b) (1982) (NLRA), governs a hybrid action, i.e., an action in which an employee may sue both his employer and the union because the union has undermined the grievance and arbitration process by violating its duty to fairly represent the employee. The timeliness of plaintiffs' claims against Eidal turns on whether the company's alleged repudiation of the bargaining agreement makes the case more closely analogous to an action on a contract than to a typical hybrid claim governed by *DelCostello*.

A.

In order to determine the proper characterization of this action, it is helpful to review the line of cases culminating in *DelCostello*. The seminal case of *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), involved a section 301 suit for breach of a collective bargaining agreement by an employer. The claim in *Hoosier* resembled a straightforward action on a contract; there was no requirement to arbitrate and the union sued directly on the bargaining agreement. The Court concluded that under these circumstances, the timeliness of the suit was to be governed by applying the most appropriate state statute of limitations. In deciding not to apply a uniform federal rule of timeliness to such actions,

the Court emphasized that national uniformity is relatively unimportant when an issue does not implicate "those consensual processes that federal labor law is chiefly designed to promote — the formation of the collective bargaining agreement and the private settlement of disputes under it." *Id.* at 702. *Hoosier* reserved the question whether different types of section 301 actions might necessitate different rules of timeliness. *See id.* at 705 n.7.

Subsequent cases wrestled with various issues involving section 301 suits. The Court allowed individual employees as well as unions to sue their employers for breach of a bargaining agreement, *Smith v. Evening News Association*, 371 U.S. 195, 200 (1962), but required them to exhaust contractually mandated grievance and arbitration procedures, *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652-53 (1965), and to abide by finality provisions contained in the agreement, *see W. R. Grace & Co. v. Local Union 759, International Union of Rubber Workers*, 461 U.S. 757, 764 (1983). If, however, a union undermined the grievance and arbitration process by violating its duty of fair representation, an employee could sue both employer and union irrespective of the finality or outcome of those proceedings. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 567-71 (1976); *Vaca v. Sipes*, 386 U.S. 171, 185-86 (1967); *see also DelCostello*, 462 U.S. at 164. These so-called hybrid actions differ significantly from cases like *Hoosier*. In a hybrid action an employee suing his employer for breach of a bargaining agreement can advance that claim only if he also prevails on a decidedly non-contractual claim against his union. *See United Parcel Service, Inc v. Mitchell*, 451 U.S. 56, 62-63 (1981). The two claims are inextricably linked, and are a creation of federal labor law that lacks any close analogy in state law. Unlike *Hoosier*, such hybrid actions directly challenge the private resolution of disputes under the grievance and arbitration procedures provided for in most bargaining agreements. *See DelCostello*, 461 U.S. at 165.

As explained in *DelCostello*, an appropriate limitations period for hybrid cases must be long enough to allow employees to vindicate their rights effectively, yet short enough to ensure "the relatively rapid resolution of labor disputes favored by federal law." *See* 462 U.S. at 168. Because of the unique nature of hybrid cases, the usual practice of seeking analogies in state law proved unsuccessful in fulfilling these federal objectives.[1] Recognizing that a uniform standard was needed, the Court in *DelCostello* responded by adopting the six-month statute of limitations contained in section 10(b) of the NLRA. *Id.* at 169-72; *see generally Jones v. Consolidated Freightways, Corp.*, 776 F.2d 1458, 1462 (10th Cir. 1985). In so doing, however, the Court reaffirmed that "resort to state law remains the norm for borrowing of limitations periods." *DelCostello*, 461 U.S. at 171.

B.

This case is superficially similar to a hybrid action. Plaintiffs are suing both their employer and their union. Additionally, the bargaining agreement contains a comprehensive grievance and arbitration clause, which applies to all disputes "as to the meaning or application of any provisions" of the agreement. *See* rec., vol. I, at 22. Considering that the signatories evinced no intention to exclude controversies arising from transactions such as the one involved in this action, arbitration would ordinarily be appropriate. *See AT&T Technologies, Inc. v. Communication Workers*, 106 S. Ct. 1415, 1418 (1986).

[1]In *United Parcel Service Inc v. Mitchell* 451 U.S. 56 (1981), the Court applied a 90-day state limitations period for vacation of a commercial arbitration award to an employee's lawsuit against his employer. In *DelCostello*, the Court noted that this choice would resolve labor disputes quickly, but at the cost of denying relatively unsophisticated employees adequate time in which to sue. *See* 461 U.S. at 165-66. The Court added that an employee's claim against his union in no way resembled an action to vacate an arbitration award. *See id.* at 166-67.

In one crucial respect, however, this case is distinguishable from a typical hybrid action, and more analogous to a contract action, as in *Hoosier*. Plaintiffs allege that Eidal repudiated the grievance and arbitration process as part of its unilateral effort to evade an undesirable bargaining agreement. The notion of a sham transaction, in the sense of being both covert and in bad faith, implies a determination to repudiate the contract and thereby avoid arbitration.[2] This contract claim in no way depends upon proof concerning "the nature of the union's discharge of its duty of representation." *See Gould, Inc. v. Adams*, 105 S. Ct. 806, 808 (White, J., joined by Brennan and Powell, JJ., dissenting from denial of certiorari). Because Eidal allegedly acted unilaterally, its potential liability to these plaintiffs is properly viewed as distinct from that of the union. *Cf. Mitchell*, 451 U.S. at 62-63. A defendant employer should not be permitted to characterize as a "hybrid action" what is essentially a contractual claim simply because the union has acquiesced in the breach. In the present case, any union complicity does no more than explain why plaintiffs have sued individually. In sum, if the complaint adequately states a claim of contract repudiation, then plaintiffs' section 301 claim against Eidal and Jencor may be properly analogized to an action on a contract, and the appropriate state limitations period should be applied.

C.

In *Vaca*, 386 U.S. at 185, the Court made clear that individual employees may sue their employer directly for

[2]An employer's repudiation of the grievance and arbitration process can also constitute an unfair labor practice within the jurisdiction of the NLRB. Such a violation, however, does not make the employer's conduct any less a breach of a collective bargaining agreement, which is actionable under §301. *See United Steelworkers v. New Park Mining*, 273 F.2d 352, 357-58: *see also Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 101 n.9 (1962). In this case, moreover, Eidal's repudiation cannot be separated from the alleged substantive breach.

breach of a bargaining agreement if the employer has effectively repudiated the grievance and arbitration process.

> "An obvious situation in which the employee should not be limited to the exclusive remedial procedures established by the contract occurs when the conduct of the employer amounts to a repudiation of those contractual procedures. Cf. Drake Bakeries, Inc. v. Local 50, Am. Bakery, etc., Workers, 370 U.S. 254, 260-263, 82 S. Ct. 1346, 1350-1352, 8 L.Ed.2d 474. See generally 6A Corbin, Contracts §1443 (1962). In such a situation (and there may of course be others), the employer is estopped by his own conduct to rely on the unexhausted grievance and arbitration procedures as a defense to the employee's cause of action."

Id. "[I]n determining whether one party has so repudiated his promise to arbitrate that the other party is excused the circumstances of the claimed repudiation are critically important." *Drake Bakeries, Inc. v. Local 50, American Bakery*, 370 U.S. 254, 262-63 (1962). An employer's repudiation may take the form of either an express refusal to abide by contractually established grievance and arbitration machinery, *see, e.g., Boone v. Armstrong Cork Co.*, 384 F.2d 285, 289 (5th Cir. 1967), or conduct which renders the employer unable or apparently unable to comply, *cf.* Restatement (Second) of Contracts §250(b) & comment c (1979). Substantive breaches of a bargaining agreement do not necessarily imply a concommitant refusal to arbitrate over the propriety of the alleged breach. *See Drake Bakeries*, 370 U.S. at 262; *Robbins v. George W. Prescott Publishing Co.*, 457 F. Supp. 915, 921 (D. Mass. 1978). A plaintiff must show some specific basis for believing that the breaching party would not submit the matter to arbitration, and conclusory allegations will not fulfill this requirement, *see Robbins*, 457 F. Supp. at 922.

Plaintiffs allege that Eidal notified its employees of the sale to Jencor only after its consummation. They allege that

Eidal proceeded unilaterally and covertly, in order to undermine the bargaining agreement. The announcement of a completed transaction deprived plaintiffs of recourse to arbitration before the sale. The July 1982 letter effectively announced an end to all contractual relations. Although this letter does not specifically disclaim the duty to arbitrate, its indication that the contract no longer existed supports an inference of repudiation. *See Kaylor v. Crown Zellerbach, Inc.*, 643 F.2d 1362, 1366 (9th Cir. 1981); *Smith v. Pittsburgh Gage & Supply Co.*, 464 F.2d 870, 875 (3d Cir. 1972). Moreover, Eidal did not transfer the bargaining agreement to Jencor, which signed a pre-hire agreement with the union and installed a new workforce on quite different terms. The complaint further alleges that the purported change in ownership from Eidal to Jencor was a sham, and that the two companies are actually the same employer.[3] These allegations describe with sufficient particularity a sham transaction that constitutes a repudiation.

D.

This case does not implicate the policy concerns which warranted the borrowing of a federal rule of timeliness in *DelCostello*. "A *Vaca v. Sipes* suit normally involves an issue that is intertwined with the day-to-day relationship between management and labor." *Adams v. Gould, Inc.*, 739 F.2d 858, 867 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 806 (1985). *Vaca*, *Hines*, *Mitchell*, and *DelCostello* all involved the alleg-

[3]Eidal argues that under a management prerogative clause it had the right to relocate or close its business, provided that notice and an opportunity for discussion was first provided to the union. Plaintiffs essentially counter that it would be a breach of an implied duty of good faith and fair dealing to sell the business for the sole purpose of evading Eidal's obligations under the bargaining agreement. *See New Park Mining Co.*, 273 F.2d at 357 (10th Cir. 1959). Given the allegations of a sham transaction and repudiation of the contract, there are clearly fact issues which prevent the assumption that the company did not breach the bargaining agreement.

edly wrongful discharge of individual employees within the context of an otherwise established and continuing relationship between management and labor. "Speed and finality in the resolution of disputes are the most relevant policies in those situations." *Id.* This case, in contrast, involves not only an alleged unilateral repudiation of the grievance and arbitration process, but a severance of all existing contractual relations. When the contract has been completely repudiated and the employer has closed down its business, the labor law policies that persuaded the Court in *DelCostello* to adopt the uniform six-month statute of limitation are not applicable.[4]

III.

The district court dismissed as time barred the federal claims contained in Counts I-III of plaintiffs' complaint and declined to exercise discretionary jurisdiction over the pendent state law claims contained in Counts IV-VI.

Count I states plaintiffs' primary basis for relief: breach of the collective bargaining agreement. For the reasons stated in Part II of this opinion, the district court erred in holding on the basis of the pleadings that this claim is sufficiently analogous to a hybrid action to warrant the application of the federal six-month statute of limitations under *DelCostello*.

[4]*Farr v. H K. Porter Co.*, 727 F.2d 502 (5th Cir. 1984), the strongest case relied upon by defendants, does not indicate otherwise. In *Farr*, the court applied §10(b)'s limitation period to employee claims against H. K. Porter and the local union for failure to negotiate over the sale of a brickmaking plant. Unlike Eidal, Porter never repudiated. The transaction instead took place in the context of an open and continuing relationship. The plaintiffs could assert only that the sale was mishandled by the employer and union working in conjunction, not that contractual relations had broken down at the employer's instigation. H. K. Porter was decided after a full trial on the merits. It would be premature to dismiss this action when plaintiffs' allegations concerning contract repudiation must be accepted as true.

If upon development of the facts it is established that the contract was not repudiated as alleged, then the six-month limitations period will apply. Otherwise, the case is governed by the most analogous New Mexico statute of limitations.

Count II charges the union with violating its duty of fair representation by, among other things, failing to protect the rights of the parties in connection with the sale. The parties in this case have addressed only the analogy between plaintiffs' section 301 claims against Eidal and Jencor and the facts of *Hoosier* versus those of *DelCostello*. No party has briefed or argued the timeliness of an independent claim against the union. Moreover, like the Count I claim, the applicable statute of limitations governing this claim may depend on the facts. We therefore decline to decide what limitations period is applicable to Count II, and we remand this issue for an initial decision by the district court.

Count III asserts that Eidal wrongfully discharged its employees. The complaint contends that these terminations helped implement Eidal's plan to evade the bargaining agreement. This alleged link with the breach of contract described in Count I indicates that these wrongful discharge claims should not be viewed as subject to section 10(b)'s limitations period. Even those workers who were discharged before the sale to Jencor allegedly had no firm basis for objecting until they realized that the transaction was a sham and that Eidal had repudiated the contract. The timeliness of Count III is therefore governed by our analysis of Count I.

Counts IV-VI seek relief under New Mexico law. The district court declined to exercise jurisdiction over these counts in the absence of any timely claim under federal law. Having reinstated plaintiffs' federal claims we also reverse the dismissal of plaintiffs' state law claims. On remand, the district court retains the discretion to decline jurisdiction if it again becomes warranted during the course of litigation.

See 13B C. Wright & A. Miller, Federal Practice and Procedure §3567.1, at 142-43 & n.31 (2d ed. 1984) (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 727 (1966)).

IV.

The judgment of the district court dismissing the complaint is reversed and the case is remanded for further proceedings consistent with this opinion.

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

RICHARD GARCIA, et al.,
Plaintiffs,

vs. No. CIV-84-142 C

EIDAL INTERNATIONAL CORP., et al.,
Defendants.

MEMORANDUM OPINION

Filed September 4, 1984

This matter comes before the Court on three Motions to Dismiss, one each filed by the Defendants Jencor International Corporation, Eidal International Corporation, and the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, Local Lodge 338. The Plaintiffs have also filed a Motion to Strike the Union's Statute of Limitations Defense. The Court, having considered the parties' memoranda and the legal authority pertinent to the issues, finds and concludes that the Defendants' Motions are well-taken and should be granted.

The Plaintiffs are former employees of Eidal International Corporation ("Eidal") and, as pertinent to that Defendant for the disposition of this motion, have alleged in Count I of their First Amended Complaint a violation of the Collective Bargaining Agreement ("CBA") which their union had negotiated with Eidal. The terms of the CBA were to run from August 2, 1981 to July 31, 1984. In January 1982 Eidal began laying off its employees. These layoffs continued until July 1982 when Eidal ceased manufacturing in New Mexico and all remaining employees were terminated. The present lawsuit was commenced on January 31, 1984.

Count I alleges a violation of the CBA and, therefore, a breach of contract. It is alleged that Jencor, as the alter ego of Eidal, was also bound by the CBA. Count II alleges that the union violated its duty of fair representation. Counts III, IV, V, and VI are pendent claims which respectively allege wrongful discharge, a conspiracy to defraud, the tortious interference with contractual relations, outrageous conduct.

This particular suit, at least as it arises under federal law, is very similar to the kind of "hybrid" cause of action, an alleged violation of the CBA under 29 U.S.C. §185 (hereinafter §301) joined with a claim that a union violated its duty of fair representation, which the Supreme Court discussed in *DelCostello v. International Brotherhood of Teamsters*, 51 U.S.L.W. 4693 (U.S. June 8, 1983) (No. 81-2386). In *DelCostello* the Supreme Court held that the six-month statute of limitations period found in Section 10(b) of the National Labor Relations Act (NLRA), 29 U.S.C. §160(b), controlled a "hybrid" cause of action based on the breach of a CBA and the breach of a union's duty of fair representation.

The present action is very similar to *Benson v. General Motors Corporation*, 716 F.2d 862 (llth Cir. 1983) wherein plaintiffs-employees sued both the employer for breach of contract and the union for breach of its duty of fair representation under §301. In *Benson* the plaintiffs contended their seniority rights were violated in that they were not accorded preferential consideration for employment in certain new General Motors plants being opened as provided for in a national agreement between General Motors and the union. *No grievance procedure for alleged violations of the seniority rights was invoked.* Instead, plaintiffs filed suit more than six months after they were aware or should have been aware of the alleged injury. The district court, following *DelCostello*, held that plaintiffs claims were barred by the six-month limitations period of §10(b) and granted sum-

mary judgment for the employer and union. The court of appeals agreed with the district court's statement of the law, but remanded the case because fact issues existed as to when employees were or should have been aware of the injury complained of.

The Tenth Circuit has also recently analyzed the *DelCostello* case in the context of the Railway Labor Act, a distinction of no moment for the purpose of these motions. The Tenth Circuit noted that:

> The Court [in *DelCostello*] held that the six-month statute of limitations expressly provided for §10(b) of the NLRA should apply to a hybrid breach of contract/duty of fair representation claim brought pursuant to that Act; a breach of the implied duty of fair representation is most analogous to an 'unfair labor practice,' which is actionable before the National Labor Relations Board under §10 of the NLRA.

Barnett v. United Air Lines, Inc., ____ F.2d ____, ___, slip op. at 10 (10th Cir. June 21, 1984). The Court has considered the Plaintiffs' attempts to distinguish *DelCostello* and finds them unpersuasive. Further, this Court agrees with the analysis expressed in *Perez v. Dana Corporation*, 718 F.2d 581 (3d Cir. 1983) that *DelCostello* should be applied retroactively.

"[T]he §10(b) period begins to run . . . when plaintiffs either were aware or should have been aware of the injury itself. . . ." *Benson v. General Motors Corp.*, 716 F.2d at 864. In the instant case as alleged in Count I, paragraph 4 of the First Amended Complaint, defendant Eidal began laying off employees in January 1982. Those layoffs continued until July 1982 when Eidal ceased manufacturing in New Mexico and all remaining employees were terminated. See Exhibit B to the First Amended Complaint. The six-month

statute of limitations would thus, at the latest, begin to run from July 22, 1982 when Eidal ceased operations and Jencor commenced operations. As more than eighteen (18) months passed from July 22, 1982 until commencement of this action on January 31, 1984, the action is barred by §10(b) of the National Labor Relations Act and *DelCostello*.

Finally, the Court will not exercise its discretion over the remaining pendent state claims. *See United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). An order in accordance with this *Memorandum Opinion* will be entered forthwith.

SANTIAGO E. CAMPOS
United States District Judge

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

RICHARD GARCIA, et al.,
Plaintiffs,

vs. No. CIV-84-142 C

EIDAL INTERNATIONAL CORP., et al.,
Defendants.

ORDER

Filed September 4, 1984

THIS MATTER comes before the Court on three Motions to Dismiss filed by the Defendants Jencor International Corporation, Eidal International Corporation, and the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, Local Lodge 338. The Court, having considered the parties' memoranda, examined the pertinent legal authority, and in accordance with its *Memorandum Opinion* finds and concludes that the Motions are well-taken and should be granted;

IT IS, THEREFORE, ORDERED that the above-described Motions to Dismiss should be, and hereby are, granted, and the Complaint is, hereby, dismissed.

SANTIAGO E. CAMPOS
United States District Judge

EXHIBIT 4

JANUARY TERM - March 12, 1987

Before Honorable Monroe G. McKay, Honorable Stephanie K. Seymour and Honorable John P. Moore, Circuit Judges.

RICHARD GARCIA, et al.,
Plaintiffs-Appellants,

v. No. 84-2255

EIDAL INTERNATIONAL CORPORATION, etc., et al.,
Defendants-Appellees.

This matter comes on for consideration of appellees' petition for rehearing filed in the captioned cause.

Upon consideration whereof, it is ordered that appellees' petition for rehearing is denied.

ROBERT L. HOECKER, Clerk

EXHIBIT 5

LABOR-MANAGEMENT RELALATIONS 29

§185. Suits by and against labor organizations

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purpose of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purpose of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

EXHIBIT 6

LABOR-MANAGEMENT RELATIONS 29

§160. Prevention of unfair labor practices — Powers of Board generally

* * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board of such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

EXHIBIT 7

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

RICHARD GARCIA, EPIFANIO VELAZQUEZ, ROBERT LEE ARAGON, MANUEL RITO CHAVEZ, GREGORY ARCHIBEQUE, J. W. HAMILTON, FRANCIS J. BOHENSKY, DENNIS EARL BARELA, ROBERT GUTIERREZ, LEROY DANIEL ZAMORA, RICHARD JARAMILLO, MAYO K. ULIBARRI, RUDOLPH SAIZ, ADELICIO G. HERRERA, IVAN ARAGON, RICHARD D. McGUIRE, CARLOS BENAVIDEZ, ERNEST TRUJILLO, MIGUEL DELGADO, FRANK SANCHEZ, ALEX MADRID, DELBERT DAVENPORT, JOE LOPEZ, MICHAEL BOCK, KENNETH GRIEGO, HARVEY WEST, LINDA POTEET MINTEER, JOHN G. RAEL, HERMAN CHAVEZ, ROBERT CHAVEZ, DAVID TRUJILLO, ORLANDO QUINTANA, WILLIAM H. HARRAH, CHRISTOPER GARCIA, BENJAMIN ARAGON, JOSEPH N. LEPESKA, TRINIDAD BARELA, SAM BLEA, JIMMY REID, THOMAS WILSON, JR., and STEVE MELTON,

Plaintiffs,

v. Cause No. CIV 84-0142C

EIDAL INTERNATIONAL CORPORATION, a foreign

corporation; JENCOR INTERNATIONAL CORPORATION, a foreign corporation; and INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, LOCAL LODGE NO. 338, a Labor organization, and INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS, AND HELPERS, AFL-CIO, a Labor organization,
Defendants.

FIRST AMENDED COMPLAINT FOR VIOLATION OF COLLECTIVE BARGAINING AGREEMENT, WRONGFUL DISCHARGE, VIOLATION OF THE DUTY OF FAIR REPRESENTATION, CONSPIRACY TO DEFRAUD, INTERFERENCE WITH CONTRACTUAL RELATIONS, AND OUTRAGEOUS CONDUCT

COME NOW the plaintiffs, by and through their attorneys of record, Marchiondo & Berry, P.A., and H. Richard Blackhurst, Esq., and for their cause of action against the above-named defendants state and allege as follows:

GENERAL ALLEGATIONS

1. Plaintiff Epifano Velazquez is a resident of Rio Rancho, New Mexico; plaintiffs Robert Lee Aragon, Manuel Rito Chavez, Gregory Archibeque, J. W. Hamilton, Francis J. Bohensky, William K. Harrah, Robert Gutierrez, Leroy Daniel Zamora, Richard Jaramillo, Mayo K. Ulibarri,

Rudolph Saiz, Adelicio Herrera, Orlando Quintana, Carlos Benavidez, Ernest Trujillo, Miguel Delgado, Frank Sanchez, Delbert Davenport, Michael Bock, Joe Lopez, Kenneth Griego, David Trujillo, Richard Garcia, Joseph N. Lepeska, Jimmy Reid, Thomas Wilson, and John G. Rael are residents of Albuquerque, New Mexico; plaintiffs Dennis Barela, Harvey West, Ivan Aragon, Richard D. McGuire, Robert Chavez, Trinidad Barela, and Linda Poteet Minteer are residents of Los Lunas, New Mexico; plaintiff Alex Madrid is a resident of Bernalillo, New Mexico; plaintiffs Herman Chavez, Benjamin Aragon, and Steve Melton are residents of Peralta, New Mexico; plaintiff Christopher Garcia is a resident of Belen, New Mexico; plaintiff Sam Blea is a resident of Rainsville, New Mexico; and plaintiff J. W. Hamilton is a resident of Corrales, New Mexico.

2. Defendant Eidal International Corporation is a foreign corporation doing business, or formerly doing business, in Bernalillo County, New Mexico, and engaged in an industry affecting interstate commerce.

3. Defendant Jencor International Corporation is a foreign corporation doing business in Bernalillo County, New Mexico, and engaged in an industry affecting interstate commerce.

4. Defendant International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers, AFL-CIO, Local Lodge No. 338 is a labor organization as defined by the National Labor Relations Act and is a subsidiary and agent of defendant national labor organization International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers, AFL-CIO.

5. Plaintiffs are former employees of defendant Eidal International Corporation, who are no longer so employed

by virtue of the acts complained of in this lawsuit, and are members or former members of defendant International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, Lodge No. 338, and its parent organization.

6. Plaintiffs collectively bring this action as a class action, pursuant to Rule 23 of the Federal Rules of Civil Procedure, for and on behalf of themselves as well as all other former Eidal employees similarly situated.

7. This Court has jurisdiction of this action pursuant to §301 of the Labor Management Relations Act, 29 U.S.C. §185; 28 U.S.C. §1337, and the Court's pendant and ancillary jurisdiction thereto.

COUNT I
VIOLATION OF COLLECTIVE BARGAINING AGREEMENT

1. Plaintiffs restate Paragraphs 1 through 7 of their general allegations previously set forth.

2. That on or about August 2, 1981, defendant International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers of America, AFL-CIO, Local Lodge No. 338 (hereinafter "Union") and defendant Eidal International Corporation (hereinafter "Eidal") did enter into a collective bargaining agreement, a true and correct copy of which is attached hereto as Exhibit "A," covering all employees in the following bargaining unit:

> All production and maintenance employees, warehousemen, truck drivers, and inspectors, certified as per N.L.R.B., but excluding all office and clerical employees, the office janitor, sales employees, guards, professional employees, assistant foremen and foremen.

That the term of such contract was from August 2, 1981, until July 31, 1984. That in the normal course of events an identical or substantially similar contract would have been entered into at the expiration of this contract by the Union and Eidal.

3. That plaintiffs were employees performing work within such defined bargaining unit during the effective period of the aforementioned collective bargaining unit and were entitled to the rights and protections accorded by such collective bargaining agreement, negotiated on their behalf by defendant Union.

4. That in 1982 defendant Eidal announced that it had sold all of the work previously performed by employees in the aforementioned bargaining unit to Jencor International Corporation (hereinafter "Jencor"). That in anticipation of such sale, and commencing in approximately January 1982 defendant did successively "lay off" groups of employees, until July 1982, at which time those remaining were terminated and those who had been laid off were advised that they would not be recalled, as evidenced by Exhibit "B" attached hereto.

5. The defendant Eidal did announce to its employees that they could apply to defendant Jencor for employment. That defendant Jencor at no time did ever intend to rehire any significant number of former Eidal employees and defendant Eidal did fail to specifically include any such provision in any sale agreement. That after hiring a few token former Eidal employees, defendant Jencor did go out on the open market and did complete its work force with outside employees. That the Jencor employees were hired on terms contrary to the collective bargaining agreement previously mentioned and for substantially less pay.

6. That defendant Eidal and defendant Jencor are the alter egos of each other, and furthermore, in essence, constitute a single employer. That the ostensible change in ownership was a fraudulent and sham transaction, designed to reduce operational overhead at the expense of Eidal's employees.

7. That being the "alter ego" of defendant Eidal, defendant Jencor was obligated, and legally bound to assume the provisions of the collective bargaining agreement in full force and effect at the time of the purported change in ownership, and to abide by its terms, including calling formerly laid off employees back to work according to seniority (Article 20); permitting bargaining unit employees to perform the work in the bargaining unit; not replacing the employees in the bargaining unit with outsiders; offering bargaining unit employees employment at the agreed-upon contract rates; contributing to the Union Pension Plan for the benefit of such employees (Article 12), and accruing to the benefit of such employees vacation pay, seniority, group life, health, and accident insurance and other benefits of the contract.

8. That defendants Eidal and Jencor did breach such collective bargaining agreement by transferring the work to be performed in the bargaining unit to a fraudulent and sham entity; by terminating the employees in the bargaining unit; by failing to rehire or recall the former Eidal employees to the new positions with Jencor on the basis of seniority; by hiring outsiders to fill such positions without first offering such positions to the former Eidal employees; by offering employment at rates substantially lower than the agreed-upon contract rates; and by causing the former Eidal employees to lose their employment, accrued year of seniority, and benefits they would have been entitled to under the contract. Defendant Union did acquiesce in the breach of contract.

9. That, in the alternative, if it is shown that defendant Jencor was not and is not the alter ego of defendant Eidal; then it is alleged that Jencor is the successor to Eidal, and that by its acts and deeds it did expressly and impliedly adopt and consent to be bound by Eidal's collective bargaining agreement, attached hereto as Exhibit "A."

10. That the conduct of defendants Jencor and Eidal and defendant Union as set forth above is so outrageous, wanton, and malicious so as to entitle those injured thereby to be entitled to recover punitive damages.

11. That as a direct and proximate result of the aforementioned breach of contract, plaintiffs have lost their livelihood, have been either unemployed for substantial periods of time or forced to accept employment at a reduced salary; have suffered emotional distress and diminishment of their lifestyle, all of which were foreseeable and known consequences of such breach; and have lost the benefits of the collective bargaining agreement which they would have been entitled to but for the actions of defendants Eidal, Jencor, and Union.

WHEREFORE, plaintiffs pray for judgment, joint and several, against defendants Eidal, Jencor, and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers, AFL-CIO, Local 338 and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, for their compensatory damages, to be shown with specificity at the trial herein, but collectively exceeding one million dollars ($1,000,000); for punitive damages in an amount of no less than ten million dollars ($10,000,000); for a pre-judgment interest on such sums; a reasonable attorney's fee, their costs of this action, and for such other just and proper relief as the Court deems warranted.

COUNT II
VIOLATION OF THE DUTY OF FAIR REPRESENTATION

1. Plaintiffs restate Paragraphs 1 through 7 of their general allegations previously set forth; and Paragraphs 1 through 11 of Count I of this complaint, previously set forth.

2. That the defendant International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, Local Lodge No. 338, (hereinafter "Union") is a labor organization as defined by the National Labor Relations Act, and was the duly certified bargaining agent for the bargaining unit described in the collective bargaining agreement, attached hereto as Exhibit "A," and is a subsidiary and agent of defendant International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO.

3. That under the provisions and policies of the National Labor Relations Act, defendant Unions had a duty to deal in good faith and to fairly represent the employees in the bargaining unit.

4. That internal union remedies to correct the acts complained of herein would be futile, or else are unavailable or inadequate.

5. That in connection with the sale and transfer of defendant Eidal's bargaining unit work to defendant Jencor, defendant Unions did breach the duty of fair representation owed plaintiffs in the following, but not limited to, manner:

a. By failing to bargain in good faith with defendant Eidal regarding the sale of the bargaining unit functions to defendant Jencor.

b. By failing to vigorously assert and protect the rights of the employees in connection with such sale.

c. By failing to negotiate from defendant Jencor a provision requiring hiring of all of the former Eidal employees.

d. By failing to file with the National Labor Relations Board unfair labor practice charges regarding the sale between Eidal and Jencor.

e. By failing to file with the National Labor Relations Board unfair labor practice charges on behalf of individual former employees of Eidal in connecting with Jencor's refusal to hire them.

f. By failing to bring appropriate legal action.

g. By failing to adequately and properly inform former Eidal employees of their legal rights and remedies.

h. By entering into an illegal pre-hire contract with Jencor which was subsequently thrown out by the National Labor Relations Board.

i. By conspiring with defendants Eidal and Jencor, and causing plaintiffs to lose their employment as a result.

j. By being solely concerned with the continuity of the union and not the welfare of the bargaining unit employees.

6. That as a result of violating the duty of fair representation owed plaintiffs by the defendant Unions, plain-

tiffs have suffered damages, as will be shown at trial.

7. That the conduct of the defendant Unions is so outrageous, wanton, and malicious, so as to warrant the imposition of punitive damages.

WHEREFORE, plaintiffs pray for judgment, joint and several, against the defendants International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers of America, AFL-CIO, and its agent International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers of America, AFL-CIO, Local Lodge No. 338 for their compensatory damages as to be shown specifically at trial, but collectively exceeding one million dollars ($1,000,000), for punitive damages in an amount of no less than ten million dollars ($10,000,000), pre-judgment interest on such sums, a reasonable attorney's fee, costs, and for such other just and proper relief as the Court deems warranted.

COUNT III
WRONGFUL DISCHARGE

1. Plaintiffs restate and reallege Paragraphs 1 through 7 of the general allegations. Paragraphs 1 through 11 of Count I of this complaint, and Paragraphs 1 through 7 of Count II of this complaint.

2. That commencing in approximately January, 1982, defendant Eidal began to "lay off" successive groups of employees on the ostensible basis that there was no work to be performed. Finally, in July 1982, those employees remaining were terminated, and those who had been previously laid off were advised that they would not be recalled, due to the fact of the sale and transfer of the production work of defendant Eidal to defendant Jencor.

3. That such layoffs and terminations were part of a pre-conceived plan or scheme; that both defendant Eidal and defendant Jencor knew that the existing collective bargaining agreement was not going to be honored by the defendant Jencor, and that defendant Jencor would not be rehiring the former Eidal employees, that in anticipation of such fraudulent transfer of the production work of defendant Eidal to its alter ego defendant Jencor, defendant Eidal did cause its normal work to be held up and directed towards defendant Jencor, so that it could lay off its employees. That the defendant Unions condoned and acquiesced in this scheme.

4. That the actions of defendants Eidal, Jencor, and the Unions, constituted, in essence, a de facto discharge or termination of the former employees of defendant Eidal, contrary to their contract of employment.

5. That such discharge was contrary to the public policy of the National Labor Relations Act and the Labor Management Relations Act which, by virtue of the Supremacy Clause of the United States Constitution, is the public policy of the State of New Mexico.

6. As a result of such wrongful discharge, plaintiffs have suffered loss of income and livelihood, diminishment of their lifestyle and other damages to be shown at trial.

WHEREFORE, plaintiffs pray for judgment, joint and several, against defendants Eidal International Corporation, Jencor International Corporation, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers, AFL-CIO, Local Lodge 338, and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers, AFL-CIO for their damages suffered as a result of such wrongful discharge to

be shown at trial, but collectively exceeding one million dollars ($1,000,000) and for punitive damages in an amount of no less than ten million dollars ($10,000,000), pre-judgment interest on such claims, a reasonable attorneys fee, costs, and for such other just and proper relief as the Court deems warranted.

COUNT IV
CONSPIRACY TO DEFRAUD

1. Plaintiffs restate and reallege Paragraphs 1 through 7 of their general allegations, Paragraphs 1 through 11 of Count I of this complaint, Paragraphs 1 through 7 of Count II of this complaint, and Paragraphs 1 through 6 of Count III of this complaint.

2. That the actions of the various defendants previously set forth constitute a conspiracy to defraud plaintiffs out of their employment and livelihood. Such conspiracy was motivated by an illegal desire to break the collective bargaining agreement, to reduce the overhead of the employing entity through a sham or fraudulent change of ownership, and to rid the employing entity of certain employees deemed for whatever reasons to be undesirable, and to accomplish such goals by the illegal means previously set forth.

WHEREFORE, plaintiffs pray for joint and several judgment against the defendants herein for their damages suffered as a result of such conspiracy, to be shown with specificity at trial, but collectively exceeding one million dollars ($1,000,000); for punitive damages in an amount of no less than ten million dollars ($10,000,000), pre-judgment interest on such claims, for reasonable attorney's fee, their costs, and for such other just and proper relief as the Court deems warranted.

COUNT V
TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS

1. Plaintiffs restate and reallege Paragraphs 1 through 7 of their general allegations, Paragraphs 1 through 11 of Count I of this complaint; Paragraphs 1 through 7 of Count II of this complaint; Paragraphs 1 through 6 of Count III of this complaint; and Paragraphs 1 and 2 of Count IV of this complaint.

2. That the actions of the various defendants previously set forth constitute a tortious interference by defendants with the employment contract of the plaintiff employees. That such interference did result in a breach of such contract.

WHEREFORE, plaintiffs pray for a joint and several judgment against the defendants named herein for their damages suffered as a result of such tortious interference with contractual relations to be shown at trial, but collectively exceeding one million dollars ($1,000,000); for punitive damages in an amount not less than ten million dollars ($10,000,000); pre-judgment interest on such sums, for a reasonable attorney's fee, their costs, and for such other just and proper relief as the Court deems warranted.

COUNT VI
OUTRAGEOUS CONDUCT

1. Plaintiffs restate and reallege Paragraphs 1 through 7 of their general allegations; Paragraphs 1 through 11 of Count I of this complaint; Paragraphs 1 through 7 of Count II of this complaint; Paragraphs 1 through 16 of Count III of this complaint; Paragraphs 1 and 1 of Count IV of this complaint; and Paragraphs 1 and 2 of Count V of this complaint.

2. That the conduct of the various defendants, as previously set forth, is so outrageous in nature as to warrant the imposition of damages therefor.

3. That as a result of such outrageous conduct, plaintiffs have suffered emotional distress, and other injury.

WHEREFORE, plaintiffs pray for a joint and several judgment against the named defendants herein for their damages as a result of such outrageous conduct to be shown with specificity at trial, but collectively to exceed one million dollars ($1,000,000); for punitive damages in an amount of not less than ten million dollars ($10,000,000); pre-judgment interest on such sums; for a reasonable attorney's fee; their costs in this matter, and for such other just and proper relief as the Court deems warranted.

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EXHIBIT A

AGREEMENT

EIDAL INTERNATIONAL CORPORATION

and

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS, AND HELPERS OF AMERICA, AFL-CIO LOCAL LODGE NO. 338

Effective:
August 2, 1981 to July 31, 1984

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EIDAL INTERNATIONAL CORPORATION
and
INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS, AND HELPERS OF AMERICA, AFL-CIO, LOCAL LODGE NO. 338

Effective August 2, 1981 to July 31, 1984.

AGREEMENT

This agreement, made and entered into this second day of August, 1981, by and between EIDAL INTERNATIONAL CORPORATION, Albuquerque, New Mexico, hereinafter referred to as the "Company" and INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS, AND HELPERS OF AMERICA AFL-CIO, LOCAL LODGE NO. 338, hereinafter referred to as the "Union".

INTENT AND PURPOSE

It is the intent and purpose of this Agreement to promote and improve industrial and economic relationships between the employees and the Company and herein to set forth the basic Agreement covering hours of work, rates of pay and conditions of employment to be observed between the parties hereto. For this purpose the parties hereto do promise and agree as follows:

ARTICLE 1
RECOGNITION

1.1 The Company recognizes the Union as the sole and exclusive bargaining agent during the term of this Agreement with regards to hours, wages, and working conditions on behalf of all production and maintenance employees, warehousemen, truck drivers, and inspectors, certified as per

N.L.R.B., but excluding all office and clerical employees, the office janitor, sales employees, guards, professional employees, assistant foremen and foremen.

ARTICLE 2
MANAGEMENT PREROGATIVE CLAUSE

2.1 It is mutually recognized and agreed by the company and the union that, except as abridged, (p. 3) delegated, granted or modified specifically by this Agreement or any supplementary agreements that may be hereinafter made, all of the rights, powers and authority the company had prior to the signing of this or any preceding agreement are retained by the company, and remain exclusively and without limitation within the rights of management. The union recognizes that the company has and retains the exclusive right to manage its business and all its actions and concerns except as expressly limited in this Agreement. The exercise of these rights, powers and authority retained by the company are not subject to the grievance procedure except as hereinafter specifically provided or as might be expressly limited by some specific provision elsewhere in this Agreement.

Without limiting the generality and purpose of the foregoing provision, this includes but is not limited to

(a) The right to select and hire, to promote, to lay off, to discharge for just cause, demote, discipline and to maintain discipline and efficiency of employees;

(b) To determine the schedules of work;

(c) Determination of products to be manufactured or services to be rendered.

(d) The location of the business, including the establishment of new business units, and the relocation or closing of the present business unit, provided that notice is first

given and opportunity for discussion is provided to the union upon proposal to relocate or close the present operations.

(e) The location or relocation of warehouses, the work to be assigned to each warehouse, the extent to which work in such warehouses shall be performed by employees covered by this Agreement.

(f) The determination of the layout and equipment to be used in the business, the processes, the techniques, methods and means of manufacture and distribution, the materials to be used and the size and character of inventories.

(g) The determination of financial policies, including accounting procedures, prices of goods or services, and customer relations.

(h) The determination of the size of the work force, the allocation and assignment of work to workers, the determination of policies affecting employees subject to the express provisions of this Agreement, the establishment of quality standards and judgment of (p. 4) workmanship required the retirement of employees.

(i) The transfer (transfers out of the unit shall be on a voluntary basis only) or classification, reclassification, layoff of employees.

(j) The control and use of all company property.

(k) The enforcement of all company rules and regulations now in effect and which may be issued from time to time and not in conflict with the specific provisions of this Agreement.

(l) The discretion in the employment of the services of all supervisors, provided Foreman shall not perform work within the bargaining unit except for training purposes or in the event of an emergency.

(m) The determination of employee competency.

(n) The right to contract or subcontract work to or from other firms.

(o) No present or past practice, prior to this Agreement, shall be binding on the company or the union.

2.2 The question of whether the company has exercised any of the foregoing rights and powers contrary to the provisions of this Agreement may be taken up under the grievance procedure hereinafter provided.

ARTICLE 3
NO STRIKE - NO LOCKOUT

3.1 The union agrees that during the term of this Agreement it will not authorize, encourage, cause, permit, engage in, or participate in any strike, walkout, sick-outs, slowdown, work stoppage, picketing, or any other types of refusals to perform assigned or ordinary duties of any employee or other similar activity involving the company, or other activity which interferes with the company's operations, or the storage, handling, sale, or delivery of any products manufactured by or handled by the company or its suppliers or customers. The union further agrees that it will not authorize or encourage any of its members to engage in such prohibited activity and, in case of breach of this provision by any of its members or any member of the bargaining unit, it will immediately and publicly disavow any breach of this clause as a violation of this contract and will use all reasonable means within its power to end such work stoppage or other prohibited activity at the earliest possible time.

3.2 If any employee violates any of the provisions (p. 5) of this Article such conduct shall constitute just cause for discharge and such discharge shall not be subject to

review under the Grievance and Arbitration procedure provided under this Agreement upon any ground except as to the question of whether or not the employee did violate a provision of this Article.

3.3 The company agrees that it will not engage in any lockout during the life of this Agreement, it being specifically understood that this provision is not intended to in any way limit the company's right otherwise under this Agreement to cease temporarily or permanently any or all of its operations and, in case of any controversy pertaining thereto, the rights of management reserved under the Management Prerogative Article of this Agreement shall be paramount.

ARTICLE 4
UNION SECURITY

4.1 All present employees covered by this Agreement and coming under the jurisdiction of the union, as set forth in the Recognition Clause, Article 1, shall, as a condition of employment, become members of the union on the sixtieth (60th) day following the effective date of this Agreement and shall remain members in good standing during the life of this Agreement. All employees hired after the effective date of the Agreement shall, as a condition of employment, become members of the union on the sixtieth (60th) day following the date of their employment, and shall remain members of the union in good standing during the life of this Agreement.

4.2 "Good standing", for the purpose of this Agreement is interpreted to mean the payment or tendering of initiation fees and periodic union dues.

ARTICLE 5
CHECK-OFF

5.1 The Employer agrees during the life of this Agreement to deduct from the net earnings due an employee in

the last pay period of each month the monthly dues and initiation fees only on a check-off authorization form as outlined below. Said authorization must be properly executed by the employee and presented to and accepted by the company. All provisions contained in said form are agreed to by the (p. 6) company and the union and made a part of this Agreement.

5.2 The company agrees to remit such deduction to the secretary-treasurer of the union within twelve (12) days after the end of each month.

VOLUNTARY CHECK-OFF FORM

_____, 19_____

I certify that __Union__ is my designated collective bargaining representative, and I hereby voluntarily authorize and direct __Company__ to deduct from my earnings due me for the last pay period in each month my monthly Union dues for that month in the sum of $_____ and pay same to the secretary-treasurer of said Union. This authorization may be revoked by me at any time upon thirty (30) days notice to the Company and the Union or upon termination of my employment. This authorization shall be subject to any limitation required by law or regulation of any authorized governmental agency.

_____

(Employee)

ACCEPTED:

_____ (Company)

By _____

(Form not valid until signature checked and authorization accepted by the Company). A form to Check-Off initiation fees will be prepared and submitted by the Union to the Company for approval.

ARTICLE 6
OVERTIME

6.1 Overtime at the rate of one and one-half (1 1/2) times the employee's base hourly rate of pay for his classifications of work shall be paid under the following conditions.

(1) For all hours in excess of eight (8) hours in any twenty-four (24) hour period. **(p. 7)**

(2) For all hours worked in excess of forty (40) hours per week.

(3) For all hours worked on Saturday.

Two (2) times the basic hourly rate of pay will be paid for all hours worked on Sunday.

6.2 Overtime payment shall not be duplicated for the same hours worked under any of the terms of this Agreement, and to the extent that hours are compensated for at overtime rates under one provision they shall not be counted as hours worked in determining overtime under any other provision.

6.3 Overtime will be distributed as equally as possible within each classification among employees who are qualified and substantially equally competent in performing the work involved. Employees will be expected to perform overtime assignments.

6.4 Employees will be given $3.50 in lieu of a meal when it is necesary to work in excess of ten (10) consecutive hours. It is understood that $3.50 will not be given when employees are scheduled to work ten (10) hour shifts.

ARTICLE 7
HOURS OF WORK

7.1 The work week shall start on Monday at 6:45 a.m. Forty (40) hours per week shall constitute a work week. Monday through Friday inclusive.

7.2 First Shift. Where more than one shift is worked, the first shift shall consist of eight (8) hours work exclusive of the one-half (1/2) hour lunch period, which shall be on the employee's time. The pay for a full first shift period shall be a sum equivalent to eight (8) times the base hourly rate.

7.3 Second Shift. The second shift shall start immediately after the first shift and shall consist of eight (8) hours work, exclusive of the one-half (1/2) hour lunch period, which shall be on the employee's time.

7.4 Third Shift. The third shift shall be a seven (7) hour period with a lunch period on company time.

7.5 Shift Differential. Employees on the second and third full shift shall receive twenty cents ($.20) per hour premium over and above their base hourly rate.

7.6 Employees will be given a ten (10) minute break during the first and second halves of the shift.

7.7 Employees shift preference by plant seniorty will be recognized, provided, skills, abilities, and (p. 8) performances needed are available upon each shift to satisfactorily and properly satisfy job needs.

ARTICLE 8
FIELD WORK

8.1 All field work performed away from the plant in

Albuquerque and immediate vicinity shall be at fifty cents ($.50) per hour over the employee's regular rate.

ARTICLE 9
HOLIDAYS

9.1 The following days shall be recognized as holidays under the terms and conditions of this Agreement, New Year's Day, Good Friday, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Friday following Thanksgiving Day, December 24th (Christmas Eve Day), Christmas Day and one (1) floating holiday.

9.2 All regular full-time employees covered by this Agreement shall receive pay at their straight time hourly rate for all hours they are normally scheduled to work on said holidays subject to the following conditions. Such employee must have worked a complete eight (8) hour shift on which he was scheduled to work immediately preceding and following such holiday unless absent because of proven sickness or injury or the employee is excused by his supervisor prior to the holiday.

9.3 In the event any of the above enumerated holidays fall on Sunday, the following Monday shall be observed as the holiday.

9.4 Employees required to work on any of the above mentioned holidays shall be compensated for all hours worked at one and one-half (1 1/2) times their basic hourly rate of pay in addition to the holiday pay as above provided.

9.5 In the event that a holiday occurs during an employee's vacation period, the employee shall receive either pay at his straight time hourly rate for the hours he would normally have worked on said holiday, or will receive an additional day's vacation and pay at the straight time hour-

ly rate for the hours he would normally have worked on said holiday. An employee must elect prior to going on vacation whether or not he desires to receive pay for the holiday or take an additional day's vacation with pay. **(p. 9)**

ARTICLE 10
REPORTING PAY

10.1 Any regular employee who worked on a given day and who was not notified not to report for work prior to his regular starting time on the following workday, and who subsequently reports for work on such following workday, and is then denied employment for such day, shall receive pay for four (4) hours' time at his straight time hourly rate of pay. In the event an employee works in excess of four (4) hours he shall be guaranteed eight (8) hours' work or eight (8) hours' pay at his straight time hourly rate of pay. The guarantee set forth herein shall not apply where the plant, the department, or any given unit thereof, in which the employee is regularly employed, is not capable of operation by reason of circumstances beyond the control of the company.

ARTICLE 11
JURY PAY

11.1 Jury duty is an obligation and most important part of our democratic process. Employees who must perform jury duty shall be given a leave of absence for that purpose. The company policy is to make up the difference between the employee's regular wage and the amount of remuneration that he may receive from the court. This payment will be made only upon receipt of adequate proof of payment from the court.

ARTICLE 12
PENSION PLAN

12.1 It is agreed that the union employees of Eidal International Corporation represented by the International

Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers of America, AFL-CIO, Local Lodge No. 338, join the Boilermakers, Blacksmiths National Pension Trust. Twenty-five cents ($.25) per employee per clock hour will be paid to the trust by Eidal International Corporation. Adjustment will be made in compensation paid to the employee by Eidal International Corporation as an offset of the cost to the company at the rate of fifteen cents ($.15) per hour.

12.2 It is agreed that the company will follow the Pension Plan as outlined in the booklet prepared by the Boilermakers-Blacksmiths National Pension Trust so that our plan will conform to all other plans represented **(p. 10)** by this trust.

12.3 Since the Pension Plan has been accepted by the union, the union will acknowledge that its pension benefits have been subject to Good Faith Collective Bargaining between Eidal International Corporation and the Union and the union acknowledges further that its members may be excluded from other employer-funded retirement plans under the provisions of the Internal Revenue Code. Section 410(b)2.

ARTICLE 13
VACATION

13.1 The company will grant one (1) week's vacation with pay (forty (40) hours at straight hourly rate) to all employees who have been in continuous service of the company for a period of one (1) year preceding the period in which the vacation is to be taken. The company will grant two (2) weeks vacation with pay (eighty (80) hours at straight hourly rate) to all employees who have been in continuous service of the company for a period of three (3) years preceding the period in which the vacation is to be taken. The company will grant three (3) weeks vacation with pay (one hundred twenty (120) hours at straight hourly rate) to all employees who have been in continuous service of the com-

pany for a period of ten (10) or more years preceding the period in which the vacation is to be taken. The company will grant four (4) weeks' vacation with pay (one hundred sixty (160) hours at straight hourly rate) to all employees who have been in continuous service of the company for a period of eighteen (18) or more years preceding the period in which the vacation is to be taken.

13.2 Employees who are laid off for lack of work and who have at least one (1) year's service with the company shall receive pro rata vacation on the basis of one-twelfth (1/12) of his annual vacation for each full month's service since his last vacation eligibility date. Employees with less than one (1) year's service are not eligible for pro rata vacation pay. If they are recalled after layoff, they will be given credit for previous service for the purpose of qualifying for their first (1st) week's vacation after completing one (1) year's service. For example, if an employee had six (6) months service, was laid off then recalled, he would become eligible for (p. 11) vacation after completing six (6) month's additional service. When an employee is recalled after layoff, he will then begin qualifying for his next vacation. Employees who voluntarily quit or who are discharged for just cause shall receive no pro rata vacation pay.

13.3 The right to determine the vacation period shall rest with the company so as to insure the continuous and proper operations of its business.

ARTICLE 14
SENIORITY

14.1 Seniority is defined as the length of service since the last date and hour of hiring. The date of hiring is the date the employee begins work. A seniority list, listing the employees according to their job classifications, shall be posted in the plant every three (3) months. The first sixty (60) days of employment with the company shall be on a pro-

bationary basis. No employees shall accrue seniority during the first sixty (60) days of employment with the company, and during such sixty (60) day period the employee shall be considered as on a probationary or trial basis. Upon successful completion of his probationary period, an employee shall acquire seniority from the date and hour of hiring. There shall be no responsibility for re-employment of probationary employees if they are discharged or laid off during the probationary period. During the probationary period, an emloyee may be discharged with or without cause and shall not have recourse to the grievance procedure or to arbitration.

14.2 In the event of a layoff, the company shall designate the number of employees in each classification to be laid off and the employees within each classification to be laid off and the employees within each classification with the least seniority shall be laid off first. The Shop Committee and the Business Manager of the union will be given 78 hours notice of a layoff. An employee who is designated to be laid off, or who is bumped, may in lieu of layoff, bump any employee in a classification, if any, in which the employee has previously worked, who has less seniority with the company, provided, in the opinion of management, the employee can satisfactorily perform the job he proposes to bump into.

14.3 Any employee who is recalled to work after layoff of one month or longer, or who returns to work (p. 12) after absence of one week or longer, due to accident or illness, may be required to take a physical examination on his own time at the company's expense by a doctor selected by the company, and passing such examination shall be a condition of being returned to work.

14.4 Any employee taking a leave of absence or being laid off for a period of one month or longer shall upon request be given a physical examination prior thereto on his own

time by a company physician but at the company's expense, the results of which examination shall be given the employee in written form.

14.5 When a permanent vacancy occurs in any classification, and if filled by promotion, it will be filled three days after posting, by promoting the employee in a lower paid classification who has the most seniority, provided that such employee, in the opinion of the company, is qualified to perform the work. The employee who is promoted shall have a trial period of not to exceed thirty (30) days in his new classification at the end of which the company can return him to his previous classification if, in the opinion of the company, he is not able to meet the requirements of his new classification. The union shall be notified in writing as to the reasons for returning an employee to his previous classification. This provision shall not prohibit the hiring of qualified people to fill vacancies as they occur or to restrict the filling of a vacancy by transfers.

14.6 Employees promoted or transferred from the bargaining unit to positions with the company outside of the bargaining unit shall retain their accumulated seniority within the bargaining unit, but shall not accumulate additional seniority while working outside the bargaining unit. When the company has a vacancy in the classification of field serviceman, first consideration will be given to employees in the bargaining unit, but time worked as field serviceman will not count toward bargaining unit seniority.

14.7 Seniority shall terminate for any one of the following reasons.

(1) Voluntary quitting.

(2) Discharge for cause. If the discharged employee is

reinstated after a hearing, he shall be reinstated with seniority right unimpaired.

(3) Failure to keep Company advised of address during period of layoff. **(p. 13)**

(4) Separation from the Company's employment by layoff for a period of one year, if the employee has one year or more service with the Company.

(5) In all other cases, after the employee has served his probationary period, separation from the Company's employment by layoff in excess of the number of days of the individual's service with the Company.

In case of a bona fide sickness, the Company, at its discretion may extend the time provided for above.

14.8 All seniority granted employees under the terms of this Agreement shall be subject to the rights granted by law to employees who volunteer or are called or conscripted for active military service under the National Guard Act of 1940, the Selective Training Act of 1948, and any additions or amendments thereto, or rulings and interpretations thereof by any authorized court or agency.

ARTICLE 15
ADJUSTMENT OF GRIEVANCES

15.1 The union shall designate a Shop Committee of not more than five (5) employees for the purpose of taking up grievances of employees with the management. The union shall notify the company of the personnel of this Shop Committee and of any subsequent changes in the personnel. The union agrees in selecting the members of the Shop Committee that length of service with the company shall be taken into consideration, and men of not less than ninety (90) days' continuous service shall be selected, if available. The com-

pany will recognize such Shop Committee and deal with it as the representative of the union on all grievances or differences as to the meaning or application of any provisions of this Agreement.

15.2 If any grievance, dispute or controversy as to the meaning or application of any provision of this Agreement arises, or should any trouble of any kind arise in the plant, there shall be no suspension of work on that account, but an earnest effort shall be made to adjust the same. It is understood and agreed by the parties hereto that in the interests of harmony, grievances should be presented and handled in an orderly manner. No grievance shall be considered that has not been handled in accordance with the time (p. 14) provisions set forth herein. The company, in the interests of prompt handling of grievances, agrees that the members of the Shop Committee, upon duly notifying their foreman, shall be allowed to leave work for grievance meetings. A member of the Shop Committee called by the company from his home for grievance meetings shall be compensated for actual hours in the meeting only, at his regular hourly rate of pay, exclusive of overtime or shift premiums, by the company. The grievance procedure shall be as follows:

Step 1. Between the aggrieved employee and his department foreman.

Step 2. If no satisfactory adjustment is thus reached, the aggrieved employee may call in a steward thus endeavor to settle the dispute with the department foreman who may call in his superior in the supervisory force.

15.3 Any grievance shall be presented in both Steps 1 and 2 within twenty-four (24) hours after its occurrence. Provided the matter is not adjusted satisfactorily, it shall then be reduced to writing by the steward handling the case, to

both the Shop Committee and to management within forty-eight (48) hours after the date of the occurrence of the grievance.

Step 3. Within twenty-four (24) hours after the receipt of the written grievance which has proceeded through Steps 1 and 2, the employee, Shop Committee, business agent and the management shall meet and consider the dispute and attempt to adjust it.

Step 4. Provided the grievance is not satisfactorily settled as provided in Step 3, then a representative of the International Brotherhood shall be called in to appear with the Shop Committee to take the case up with management representatives in a further effort to arrive at a satisfactory adjustment. This meeting shall be held not more than five (5) days after the hearing provided in Step 3.

ARTICLE 16
ARBITRATION

16.1 A grievance based upon an alleged violation by the company of this Agreement may be submitted to **(p. 15)** arbitration as hereinafter set forth.

16.2 The union may elect to take the grievance to arbitration by giving the company written notice of its election to do so within forty-eight (48) hours after the grievance procedure set forth in Step 4 has been exhausted, and requesting the Federal Mediation and Conciliation Service to submit a panel of seven (7) names of prospective arbitrators. The parties shall alternately strike names from the list with the union striking the first name, and when only one name remains, that person shall be the arbitrator.

16.3 It shall be the duty of the Arbitrator to hear and to determine the matter in dispute or controversy and a find-

ing or award of said Arbitrator shall be final and conclusive upon the company, the union and the affected employee.

16.4 The Arbitrator shall not have the power to add to, subtract from, or modify any of the terms of this Agreement. Practices prior to the effective date of this Agreement shall not be considered as basis to determine the meaning of this Agreement.

16.5 Each party shall bear the expense of presenting its own case and the expense of its witnesses. The expense of the Arbitrator shall be shared equally by both parties. Stenographic expenses shall be borne entirely by the party desiring the transcript of the record.

16.6 Pending and after the settlement by arbitration of any dispute or controversy which may arise hereunder, there shall be no lockout, strike or picketing.

ARTICLE 17
SAFETY AND SANITATION

17.1 The company shall continue to make reasonable provision for the safety and health of its employees at the plant during the hours of their employment. Protective devices to properly protect employees from injury shall be provided by the company in accordance with the Occupational Safety and Health Act of 1971. It is agreed that employees, individually and collectively, will abide by the rules set up by the parties hereto in the interests of health, safety and cleanliness and with the regulations adopted under said Act.

17.2 The company will pay each employee $15.00 per pair, toward two (2) pairs of safety shoes per year. **(p. 16)**

17.3 The company, in joint meeting with the Shop Committee, will select a Safety Committee not to exceed two

(2) union members to work with the Company Safety Committee and the Committee shall not meet more often than once a month, at which time they shall consider all safety suggestions made by the union committee or other employees and make recommendations with respect thereto to the plant superintendent. It is intended that these committees shall act in an advisory capacity to management to the end that the safety and health of the employees as individuals and as a group shall be constantly improved.

17.4 The union agrees to cooperate with the company in enforcing safety rules posted by the company and any additional rules or amendments agreed upon by the Joint Safety Committee. The company shall have the right to discipline employees for persistent violation of such rules.

ARTICLE 18
DISCHARGE

18.1 The company retains the right to manage the plant and direct the working forces, including the right to hire, promote, transfer, or discharge employees for just cause such as

(1) Bringing intoxicants, narcotics or other dangerous drugs onto company property or consuming intoxicants, narcotics or other dangerous drugs in the plant or on company property or reporting for duty under the influence of intoxicants or narcotics.

(2) Walking off the job without notifying the shop superintendent or foreman.

(3) Refusal to obey legitimate instructions.

(4) Dishonesty or deliberate destruction or removal of the company's property.

(5) Neglect of duty or visiting and loafing during working hours.

(6) Disorderly conduct, including horseplay and fighting in the plant or on company property.

(7) Failure to report an injury to a foreman or assistant foreman during the shift in which the injury occurred or when it is discovered.

(8) Incompetence or insubordination. **(p. 17)**

(9) Excessive absenteeism and/or tardiness, as determined by the company.

(10) Upon receipt of a third (3rd) warning for offences except as mentioned above during a twelve (12) month period.

18.2 It is agreed, however, that any grievance under the Discharge Clause will be settled through the Grievance and Arbitration Procedures, Articles 15 and 16.

18.3 Any discharge cases going to arbitration shall be only as to the question of whether the employee did or did not violate the rule. No arbitrator shall have the power to decide the degree or seriousness of the violation or to substitute his judgment of the discipline merited.

ARTICLE 19
CLASSIFICATION AND RATES OF PAY

19.1 The classifications, job descriptions and hourly rates of pay shall be as set forth in Appendix "A" attached hereto and by this reference made a part hereof.

19.2 All employees shall be paid at the contract classification rates of pay provided in Appendix "A" of this Agree-

ment. Any employees who receives a rate of pay in excess of the applicable contract classification rate will not receive any increases in their rate of pay until the applicable contract classification rate exceeds the rate of pay they are receiving. At such time as the then applicable contract classification rate exceeds the rate of pay that such employees have been receiving, they shall then receive a raise to the contract classification rate. All to the end that at that point in time all employees will be paid at the then applicable contract classification rate of pay and no employee will be paid in excess thereof.

ARTICLE 20
RECALL FROM LAYOFF

20.1 The company will recall to work after layoff in reverse order to the order of layoff in the same classification as used when laid off. In affording employees recall rights as herein provided, the company shall notify the laid-off employees in person, by telephone, telegram or certified letter at their last **(p. 18)** known address and the employee shall return to work within five (5) days of notification unless the company extends the time in which to return. All employees who fail to return to work within such specified time following notice shall no longer enjoy this recall right and will thereby forfeit all seniority and seniority rights with the company.

ARTICLE 21
INSURANCE

21.1 The company will continue in effect the existing group life, health and accident insurance, except that the company may elect to substitute some other insurance company, and the amount of weekly benefit payable for sickness and accident will be $125.00. Employees will become eligible for insurance after their 31st day of continuous employment and will be covered for thirty (30) days after lay-off.

ARTICLE 22
NON-DISCRIMINATION

22.1 All recruiting, hiring and promoting in all job classifications shall be accomplished without regard to race, color, religion, sex or national origin except where sex is a bona fide qualification.

22.2 All personnel actions such as compensation, benefits, advancement, transfers, layoffs and recall from layoffs will be administered without regard to race, color, religion, sex or national origin.

ARTICLE 23
SAVING CLAUSE

23.1 Should any clause or provision of this Agreement be declared illegal, or be in conflict with any law or regulation covering the business of the company, both parties agree that the Agreement is automatically amended to comply with such law or regulation and the rest and remainder of this Agreement shall not be affected thereby and shall remain in full force and effect.

ARTICLE 24
MISCELLANEOUS

24.1 The company will furnish employees the tools needed in the performance of their work. Employees shall be responsible for the proper care of such tools **(p. 19)** and shall replace any missing tools at their own expense.

Employees will be required to sign for all tools issued to them, which will contain an authorization by the employee for the company to deduct from any paycheck or other funds due an employee upon his quitting, being discharged, or otherwise terminating his employment, the costs of replacing any missing tools which the employee has failed to otherwise replace or pay for.

24.2 The company and the union agree that due to a problem the company and employees have encountered with tools and equipment disappearing from the plant, it shall be a condition of employment for all employees to open lunch boxes, bags, or other containers as they are leaving the plant, to permit the company's Security Personnel to check for company property. It is further agreed that failure to cooperate with the company and its Security Personnel in such property checks, shall be grounds for termination. Further, any attempt to remove company property without proper authorization shall be grounds for termination.

ARTICLE 25
COMPLETED CONTRACT CLAUSE

25.1 The parties acknowledge that during negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of said rights are set forth in this Agreement. Therefore, the company and the union, for the life of the Agreement, each voluntarily and unqualifiedly waives the right and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter not specifically referred to or covered in this Agreement even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement. This, however, will not preclude the parties from making any changes by mutual agreement. **(p. 20)**

ARTICLE 26
TERM OF AGREEMENT

26.1 This Agreement shall become effective as of the

second day of August, 1981, and shall remain in full force and effect until and including the 31st day of July, 1984, and shall automatically be renewed from year to year thereafter unless termination or changed pursuant to the following conditions:

(1) If either party elects to terminate such party shall on a date not less than sixty (60) days, nor more then seventy-five (75) days, prior to the expiration date of the Agreement, give written notice to the other party of intention to terminate and by such action the Agreement shall, for all purposes, terminate as of the expiration date of the Agreement.

(2) If either party elects to change any of the provisions of the Agreement, such party shall on a date not less than sixty (60) days, nor more than seventy-five (75) days prior to the expiration date of the Agreement, give written notice to the other party specifying the changes desired. Changes in the Agreement shall be limited to those outlined in writing and all items of the Agreements not specifically set forth in the written notice shall be regarded as automatically renewed. Negotiations shall begin within fifteen (15) days after receipt of such notice.

26.2 This instrument constitute the entire Agreement between the parties hereto, and the company and the union and its members will abide by it.

IN WITNESS WHEREOF, the parties hereto have caused their names to be hereunto subscribed by their appropriate officers, duly authorized to do so, all as of the day and year first above written.

EIDAL INTERNATIONAL CORPORATION

EDMOND J. ATELIAN

President

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS (p. 21) OF AMERICA, AFL-CIO, LOCAL LODGE NO. 338

By _____
VICTOR LOVATO,
Secretary-Treasurer and Business Manager

_____
ROBERT ARAGON, Committeeman

_____
A. G. HERRERA, Committeeman

_____
ALBERT SALAS, Committeeman

_____
JESSIE VALDIVIA, Committeeman

APPENDIX "A"

CLASSIFICATION AND RATES OF PAY. The following classifications and hourly rates of pay shall be in effect in accordance with the dates as outlined below. It is understood and agreed that the company will have the right to classify its employees as well as to grant premium increases whenever, in its opinion, the employee merits same and also to take away premium pay when appropriate. The company has the descretion to fill or not fill the classification of "Layout Man" and to assign or not assign layout type duties to other employees.

Effective 8-1-1982, and again on 8-1-1983, all classification rates will be increased by 100% of the Cost of Living

increase percentage for the immediate preceding year, based upon the Consumer Price Index, all as published and determined by the U.S. Department of Labor, or 5.5%, whichever is more. **(p. 22)**

CLASSIFICATION
JOURNEYMAN MECHANICS "A"; **RATES PER HOUR**
Effective 8-2-1981

Layout Man
An employee who is capable of reading engineering blueprints, sketches or diagrams and can transfer the lines and dimensions to full scale layouts on steel plate, tubing bars or pipe.

8.76

Welder
Must be certified welder under American Welding Society criteria, or be able to pass test required by the company. Must be able to weld using stick rod semi-automatic welding machines. Must be able to read drawings showing weld symbols and welding information.

8.76

Welder - T.I.G.
Must be a certified welder under American Welding Society criteria for code welding using Tungsten Intert Gas.

8.76

Burner
Must be capable of doing freehand burning and operating burning machines to the requirements of the Employer.

8.76

Maintenance Mechanic
A person who keeps machinery and mechanical and electrical equipment in a state of good repair, capable of detecting faulty part or parts, dismantling machine, replacing part or

parts, reassembling machine, making necessary adjustments to insure efficient operation, affixes special attachments and oils and greases machinery and can operate a Hyster on Saturday and Sunday when less than 2 hours of Hyster time is required.

8.76

Fitter
An employee who is capable of reading blueprints, sketches or diagrams, and from this information fit various parts into assemblies to meet specified requirements. He will be required not only to fit the various **(p. 23)** parts into the assemblies, but also to do all necessary tack welding.

8.76

Spray Painter
An employee who is capable and required to coat surfaces of manufacturer's articles, finishes materials with paint, lacquer, stain or other types of covering required by the Employer, with a spray gun. Must be able to disassemble, clean and assemble spray gun. Have knowledge of necessary pressure in the operation. When necessary, should be able to use hand brush. Should have knowledge and be able to mix paints, lacquers, stains and other coating material.

8.76

Machine Operator - Sheet Metal
An employee who is capable and required to operate the large shear, large press brake and bar bending machines.

8.76

Tool and Die Maker
An employee who has served an apprenticeship of four (4)

years as a Tool and Die Maker, or who has worked a period of four (4) years at the tool and die trade. He must have the ability to design his own tools, jigs, fixtures, dies and so forth, working from engineering drawings.

8.91

Journeyman Machinist
Sets up and operates all types of machine tools to include drills, mills, lathes, grinders and boring machines to perform machining operations in the making of components and product parts and their rework or modification. Performs any necessary layout in connection with the above machining jobs from either blueprints, sketches or verbal instructions. Will perform related bench and hand work. Must work with a limited amount of supervision.

8.91 **(p. 24)**

Inspector
Complete inspection of major and minor parts, subassemblies, assemblies and components using all types of precision, standard and special measuring instruments and inspection equipment. Dimensional inspection with improvised setups using height gauges, surface plate, indicators, etc. Basic trigonometry to determine angles, chords, and hole spacing. Concentricity checks with the use of rotab. Verification of machine setups where standard inspections are not adaptable. Works from drawings, oral or written instructions to determine nature and extent of defect. Makes repetitive layout inspections and sets up complex inspection equipment. Instructs lower-rated employees. Maintains all pertinent or necessary records, charts, etc. Performs related duties.

8.76

Assembler
An individual who must be able to perform any of the duties required for both mechanical and electrical assembly. Must be able to assemble mechanical and electrical units or fabricated parts to form complete units for assemblies using hand tools or machine tools, read diagrams (mechanical and electrical) and blueprints, measuring instruments and such special equipment as may be required, including testing and approval of all products. Also correctly fitting parts by filing, grinding and correcting faults.

8.76

Carpenter
Performs ordinary duties and functions of a Carpenter, including plans, lay out and performs a wide variety of carpentry work using sketched, blueprints, diagrams and oral and written instructions involving trailer decking, shipping containers and boxes.

8.76 **(p. 25)**

CLASSIFICATION
MECHANICS
"B"

Welder
Must have a maximum of six (6) months' experience as a welder but has not passed the required code test nor has adequate experience required for a Journeyman Welder. Additional training will be required to qualify for the higher classification.

7.16

Burner
Must have a minimum of six (6) months' experience as a

burner but has not passed the required code test nor has adequate experience required for a Journeyman Burner. Additional training will be required to qualify for the higher classification.

7.16

Spray Painter
Must have a minimum of six (6) months' experience as a spray painter but has not passed the required code test nor has adequate experience required for a Journeyman Spray Painter. Additional training will be required to qualify for the higher classification.

7.16

Sandblaster
An employee who is capable and is required to remove paint, scale, grease, tar, rust and dirt from the surface of metal objects, usually preparatory to machining, painting, polishing or plating by directing a stream of said, grit, or steel shot and compressed air from a nozzle against the surface of the objects; wears heavy gloves to protect hands when holding objects in sandblast stream, and a helmet or hood as protection against breathing sand-laden air and to protect eyes.

7.16

Maintenance Mechanic
A person who assists in keeping machinery and mechanical and electrical equipment in state of good repair, detecting faulty part or parts, dismantling machine, replacing part or parts, reassembling machine, making **(p. 26)** necessary adjustments to insure efficient operation, affixes special attachments and oils and greases machinery, and can oper-

ate a Hyster on Saturday and Sunday when less than 2 hours of Hyster time is required.

7.16

Fitter
Must have a minimum of six (6) months' experience as a fitter but has not passed the required code test nor has adequate experience required for a Journeyman Fitter. Additional training will be required to qualify for the higher classification.

7.16

Machine Operator
An employee who is capable of operating individual machines, such as drill presses, grinders, mills, lathes, boring machines, large shear, large press brake and bar bending machines, but who must occasionally have assistance in setting up the various jobs that are required.

7.16

Assembler
An individual who must be able to perform the duties in one area or one station of the assembly line. Must be able to read mechanical and electrical diagrams and blueprints, wire, and assemble equipment using hand tools.

7.16

CLASSIFICATION
MATERIAL HANDLING
AND OTHERS:

Mobile Crane Operator
An employee whose principal duties are the operation of power-operated cage controlled cranes.

7.16

RATES PER HOUR
Effective 8-2-1981

Hyster Operator
An employee whose principal duties are the operation of power-type cranes and Hyster machines, also inspects equipment daily and performs daily preventative maintenance on equipment.

6.80 **(p. 27)**

Crane Rigger
Assists crane operator in affixing crane cable or ropes or chains, slings, or other grappling equipment to object being lifted, signals operator when load is ready to be lifted. Follows load to point of destination and signals operator when to lower load, removes grappling equipment.

6.80

Tool Crib Attendant
An employee who has charge of tools and equipment such as wrenches, machine attachments, measuring devices, hand tools, issues tools to and receives them from workmen, keeps records of the receipt and issuance of tools.

6.70

Helper
An employee whose work consists of helping other employees in the classifications listed above, who occasionally performs the operations listed under the machine operator classification, but whose main job is not repeatedly doing such work.

6.70

Shop Janitor
Will be required to do normal janitorial work throughout the shop, shop offices and rest rooms, including but not limted to, sweeping floors, collecting chips that have come

from machines, cleaning shop offices; cleaning rest rooms and cleaning the yard and parking lot.

6.57

Shipping and Receiving Clerk
An employee who is capable of receiving incoming freight, properly checking, counting and verifying material shipments, and preparing the proper paperwork for inspection, stores and receiving reports. Must be able to process commercial, government and overseas shipments, including export packing. Must be able to prepare Bills of Lading and Invoices, and to distribute and file shipping and receiving (p. 28) papers. Monitors both in and out bound shipments and maintains status records. Drives company vehicles, including trucks to pick up and deliver parts and supplies.

7.72

Storekeeper
An employee who knows, handles and stores all material and supplies. Also issues material and supplies as required. He ~~also must~~ be able to drive fork lifts and light trucks as related to Storekeeper duties. Must be capable of keeping pertinent records.

7.72

Expediter
Moves material and supplies to any machine, department or area. Keeps records of receipts and deliveries. Schedules the material and work in each work area to insure that work is completed on time for final assemble and/or shipment.

6.99

Truck Driver
An employee must have a current chauffeur's license for the

State of New Mexico to be able to drive any commercial vehicle. The employee must also have a physical exam from a physician which qualifies him under the rules of the Department of Transportation. He also must have an application for employment completed showing his driving experience for the last five years, accident history for the last five years, and all speeding citations for the last five years. A Company Representative must certify that he is qualified to operate the required vehicle.

Salaried.

Trainee
An employee who has been moved from the helper classification into a trainee classification where this individual will be trained in a planned company training program in a particular work area. The individual will be trained for six months and **(p. 29)** upon successful completion of the program, will become a Machine Operator "B". Wage increases will be given if performance is satisfactory, at three months ($.10) and again at six months to start of rate range for Machine Operator "B".

All employees assigned into Journeyman "A" Classification will be required to prove ability by experience or testing. Those failing to qualify will be placed in Mechanic "B" Classification and held there for a minimum of six (6) months or until qualifications have been proven.

When the classification of Leadman is utilized by the company, the employee will be paid ten percent (10%) above the highest job classification which he supervises.

LEADMAN

A Leadman is a member of the union who has been

BEST AVAILA

selected by the company to lead a group of union employees under various classifications, such as welders, fitters, assemblers, etc. He receives his instructions from the Plant Superintendent or foreman and relays these instructions to the workers, however, the Plant Superintendent or the foremen may direct the work of the workers when necessary.

The Leadman is in a certain classification. He works at his trade and also directs the efforts of other workers in his work area or in other work areas, as necessary.

The union reserves the right to file a grievance against the foreman or Plant Superintendent when the union feels the Leadman has exceeded his duties and/or authority. This grievance procedure shall start at Step 3 as provided in Article 15, Paragraph 15.3. **(p. 30)**

BLE COPY

EXHIBIT B

REPLY TO BOX 2087

EIDAL INTERNATIONAL CORPORATION
245 WOODWARD RD., S.E.
ALBUQUERQUE, NEW MEXICO 87103

July 22, 1982

All Eidal employees, members of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers of America, AFL-CIO, Local Lodge No. 338

is to inform you that Eidal International Corporation ceased its manufacturing operations at its Albuquerque, Mexico, plant. As a result of termination of its facturing operations, it is necessary that all em- ees be terminated. All employees who are currently ayoff are hereby notified that they will not be lled, and all other employees are hereby notified of termination.

Edmond J. Atelian, President of Eidal International oration, has requested that I give you this notifi- on and that I express to you his sincere appreciation your past services. Mr. Atelian has arranged to ide the Brotherhood with a sum of money to be dis- uted to all employees who have tenure of more than e years, with such distribution to be on the basis eniority.

rance benefits will be continued for 30 days after ff for all employees terminated hereby, and for all oyees who have been subject to layoff within the 30 days.

TELEPHONE (505) 243-1341 CABLE CODE EIDAL TELEX 66 0486

EXHIBIT B

All Eidal employees, et al.

reason for the termination of Eidal operations is
t it has transferred all of its manufacturing opera-
ns and facilities to JENCOR International Corporation,
ompany owned and controlled by Mr. Gary Jenkins,
sently of Albuquerque, New Mexico. Mr. Jenkins will
ticipate directly in the management and administration
the business of JENCOR.

is presumed that JENCOR will employ some of you in its
ufacturing operations. It is requested that I
ounce to you that it will commence its hiring within
ew days, and those of you wishing to seek employment
uld make application to the Personnel officers of
COR.

in, on behalf of Mr. Atelian and on behalf of
al International Corporation, please accept our
cere gratitude for your past loyal and diligent
vice.

Sincerely yours,

/s/
Derwood Knight
Chairman of the
Board of Directors
Eidal International Corp.

EXHIBIT 8

Form NLRB-500
(4-73)

FORM EXEMPT UNDER
44 U.S.C. 3512

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

SECOND AMENDED
CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

INSTRUCTIONS: File an original and 3 copies of this charge and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No. 28-CB-2025

Date Filed October 15, 1982

1. LABOR ORGANIZATION OR ITS AGENTS AGAINST WHICH CHARGE IS BROUGHT

a. Name	b. Union Representative to Contact	c. Phone No.
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge No. 338, AFL-CIO	Victor Lovato	242-7615

d. Address (Street, city, State and ZIP code) 1115 4th Street, N.W., Albuquerque, N.M. 87102

e. The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of section 8(b), subsection(s) (1)(A) and (2) (List Subsections) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses plants involved, dates, places, etc.) On or about July 17, 1982, the above-named labor organization negotiated and signed a collective-bargaining agreement with JENCOR International Corporation, which agreement includes a union-security clause, at a time when JENCOR had no employees in the bargaining unit.

3. Name of Employer	4. Phone No.
JENCOR International Corporation	243-1341

5. Location of Plant Involved (Street, city, State, and ZIP code)	6. Employer Representative to Contact
245 Woodward Road, SE Albuquerque, N.M. 87103	Almira Saffle

7. Type of Establishment (Factory, mine, wholesaler, etc.)	8. Identify Principal Product or Service	9. No. of Workers Employed
Factory	Trailers	150

EXHIBIT 8 (Continued)

10. Full Name of Party Filing Charge
Adelicio G. Herrera

11. Address of Party Filing Charge (Street, city, State and ZIP code) Route 5, Box 5329
Albuquerque, N.M. 87123

12. Telephone No.
299-0025

13. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By /s/ Adelicio G. Herrera — an Individual
(Signature of representative or person making charge) — (Title or office, if any)

ADELICIO G. HERRERA

Address Route 5, Box 5329 — 299-0025 — October 15, 1982
Albuquerque, N.M. 87123 — (Telephone Number) — (Date)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U. S. CODE, TITLE 18, SECTION 1001) *

EXHIBIT 9

FORM NLRB-501
(2-67)

FORM EXEMPT UNDER
44 U.S.C. 3512

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

AMENDED **CHARGE AGAINST EMPLOYER**

INSTRUCTIONS: File an original and 4 copies of this charge with NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No. 28-CA-7103

Date Filed October 13, 1982

1. EMPLOYER AGAINST WHOM CHARGE BROUGHT

a. Name of Employer: JENCOR International Corporation

b. Number of Workers Employed: 150

c. Address of Establishment: (Street and number, city, State and ZIP code) 245 Woodward Road, SE Albuquerque, N.M. 87103

d. Employer Representative to Contact: Almira Saffle

e. Phone No.: 243-1341

f. Type of Establishment: (Factory, mine, wholesaler, etc.) Factory

g. Identify Principal Product or Service: Trailers

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a), subsections(1) and (2) and (3) (List subsections) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basic of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.) On or about July 17, 1982, the above-named Employer negotiated and signed a collective-bargaining agreement with International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge No. 338, AFL-CIO, which agreement includes a union-security clause, at a time when the Employer had no employees in the bargaining unit.

Since on or about July 22, 1982, the above-named Employer has failed and refused to hire Adelicio G. Herrera in retaliation for his protected, concerted or union activities.

By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

EXHIBIT 9 (Continued)

3. Full Name of Party Filing Charge (If labor organization, give full name, including local name and number)
Adelicio G. Herrera

4a. Address (Street and number, city, State, and ZIP code) Route 5, Box 5329
Albuquerque, N.M. 87123

4b. Telephone No. 299-0025

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filed in when charge is filed by a labor organization)

6. **DECLARATION**

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By /s/ Adelicio G. Herrera — an Individual
(Signature of representative or person filing charge) (Title, if any)
ADELICIO G. HERRERA

Address Route 5, Box 5329 — 299-0025 — October 13,1982
Albuquerque, N.M. 87123 (Telephone No.) (Date)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U. S. CODE, TITLE 18, SECTION 1001) *

EXHIBIT 10

FORM NLRB- 4775
(6-78)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

In the Matter of International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge No. 338, AFL-CIO (JENCOR International Corporation)
Case 28-CB-2025

SETTLEMENT AGREEMENT

The undersigned Charged Party and the undersigned Charging Party, in settlement of the above matter, and subject to the approval of the Regional Director for the National Labor Relations Board, HEREBY AGREE AS FOLLOWS:

POSTING OF NOTICE — Upon approval of this Agreement, the Charged Party will post immediately in conspicuous places in and about its office, including all places where notices to members are customarily posted, and maintain for 60 consecutive days from the date of posting, copies of the attached Notice made a part hereof, said Notices to be signed by a responsible official of the Charged Party and the date of actual posting to be shown thereon. In the event this Agreement is in settlement of a charge against a union, the union will submit forthwith signed copies of said Notice to the Regional Director who will forward them to the employer whose employees are involved herein, for posting, the employer willing, in conspicuous places in and about the employer's plant where they shall be maintained for 60 consecutive days from the date of posting.

COMPLIANCE WITH NOTICE — The Charged Party will comply with all the terms and provisions of said Notice.

We will, together with JENCOR International Corporation, reimburse all present and former JENCOR employees for dues and other moneys which they may have paid to International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge No. 338, AFL-CIO, under the July 18, 1982, contract between JENCOR and said union.

By entering into this Settlement Agreement, Local Lodge No. 338 does not admit that it engaged in any violations of the Act.

*corrected by hand to July 19, 1982

REFUSAL TO ISSUE COMPLAINT — In the event the Charging Party fails or refuses to become a party to this Agreement, and if in the Regional Director's discretion it will effectuate the policies of the National Labor Relations Act, the Regional Director shall decline to issue a Complaint herein (or a new Complaint if one has been withdrawn pursuant to the terms of this Agreement), and this Agreement shall be between the Charged Party and the undersigned Regional Director. A review of such action may be obtained pursuant to Section 102.19 of the Rules and Regulations of the Board if a request for same is filed within 10 days thereof. This Agreement is contingent upon the General Counsel sustaining the Regional Director's action in the event of a review. Approval of this Agreement by the Regional Director shall constitute withdrawal of any Complaint(s) and Notice of Hearing heretofore issued in this case, as well as any answer(s) filed in response.

PERFORMANCE — Performance by the Charged party with the terms and provisions of this Agreement shall commence immediately after the Agreement is approved by the Regional Director, or, if the Charging Party does not enter into this Agreement, performance shall commence immediately upon receipt by the Charged Party of advice that no review has been requested or that the General Counsel has sustained the Regional Director.

NOTIFICATION OF COMPLIANCE — The undersigned parties to this Agreement will each notify the Regional Director in writing what steps the Charged Party has taken to comply herewith. Such notification shall be given within 5 days, and again after 60 days, from the date of the approval of this Agreement. In the event the Charging Party does not enter into this Agreement, initial notice shall be given within 5 days after notification from the Regional Director that no review has been requested or that the General Counsel has sustained the Regional Director. Contingent upon compliance with the terms and provisions hereof, no further action shall be taken in this case.

JENCOR INTERNATIONAL CORPORATION

(Party in Interest)

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, LOCAL LODGE NO. 338, AFL-CIO

(Charged Party)

By: /s/ Wayne E. Bingham

(Name and Title)

ADELICO G. HERRERA, an Individual

(Charging Party)

By: Gerald R. Bloomfield, Attorney
(Name and Title)

Date: October 18, 1982

By: /s/ Adelicio G. Herrera
(Name and Title)

Date: October 20, 1982

Recommended By: Kathleen McCorkell /s/
(Board Agent)

10/20/82

Approved By: /s/
Milo V. Price, Regional Director

Date: 10/20/82

* U.S. GOVERNMENT PRINTING OFFICE 1979-299-009

EXHIBIT 11

FORM NLRB - 4775
(6-78)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

In the Matter of JENCOR International Corporation
Case 28-CA-7103

SETTLEMENT AGREEMENT

The undersigned Charged Party and the undersigned Charging Party, in settlement of the above matter, and subject to the approval of the Regional Director for the National Labor Relations Board, HEREBY AGREE AS FOLLOWS:

POSTING OF NOTICE — Upon approval of this Agreement, the Charged Party will post immediately in conspicuous places in and about its plant, including all places where notices to employees are customarily posted, and maintain for 60 consecutive days from the date of posting, copies of the attached Notice made a part hereof, said Notices to be signed by a responsible official of the Charged Party and the date of actual posting to be shown thereon. In the event this Agreement is in settlement of a charge against a union, the union will submit forthwith signed copies of said Notice to the Regional Director who will forward them to the employer whose employees are involved herein, for posting, the employer willing, in conspicuous places in and about the employer's plant where they shall be maintained for 60 consecutive days from the date of posting.

COMPLIANCE WITH NOTICE — The Charged Party will comply with all the terms and provisions of said Notice.

We will, together with International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge No. 338, AFL-CIO, reimburse all present and former JENCOR International Corporation employees for dues and other moneys which they may have paid to International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge No. 338, AFL-CIO, under the * July 18, 1982, contract between JENCOR and said union.

The Regional Director reserves the right to use any and all evidence in Case 28-CA-7103, herein being settled, in connection with litigation bearing upon the issue of JENCOR's alleged discriminatory failure and refusal to hire Adelicio G. Herrera. By entering into this settlement agreement, the Charged Party does not admit the commission of any unfair labor practices.

* corrected by hand to July 19, 1982

EXHIBIT 11 (Continued)

REFUSAL TO ISSUE COMPLAINT — In the event the Charging Party fails or refuses to become a party to this Agreement, and if in the Regional Director's discretion it will effectuate the policies of the National Labor Relations Act, the Regional Director shall decline to issue a Complaint herein (or a new Complaint if one has been withdrawn pursuant to the terms of this Agreement), and this Agreement shall be between the Charged Party and the undersigned Regional Director. A review of such action may be obtained pursuant to Section 102.19 of the Rules and Regulations of the Board if a request for same is filed within 10 days thereof. This Agreement is contingent upon the General Counsel sustaining the Regional Director's action in the event of a review. Approval of this Agreement by the Regional Director shall constitute withdrawal of any Complaint(s) and Notice of Hearing heretofore issued in this case as well as any answer(s) filed in response.

PERFORMANCE — Performance by the Charged party with the terms and provisions of this Agreement shall commence immediately after the Agreement is approved by the Regional Director, or, if the Charging Party does not enter into this Agreement, performance shall commence immediately upon receipt by the Charged Party of advice that no review has been requested or that the General Counsel has sustained the Regional Director.

NOTIFICATION OF COMPLIANCE — The undersigned parties to this Agreement will each notify the Regional Director in writing what steps the Charged Party has taken to comply herewith. Such notification shall be given within 5 days, and again after 60 days, from the date of the approval of this Agreement. In the event the Charging Party does not enter into this Agreement, initial notice shall be given within 5 days after notification from the Regional Director that no review has been requested or that the General Counsel has sustained the Regional Director. Contingent upon compliance with the terms and provisions hereof, no further action shall be taken in this case.

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, LOCAL LODGE NO. 338, AFL-CIO
(Party in Interest)

By: /s/Gerald R. Bloomfield, Attorney
(Name and Title)

JENCOR INTERNATIONAL CORPORATION	ADELICO G. HERRERA
(Charged Party)	*(Charging Party)*
By: Wayne E. Bingham, Attorney	By: /s/ an Individual
(Name and Title)	*(Name and Title)*
Date: 10-19-82	Date: October 20, 1982

EXHIBIT 11 (Continued)

Kathleen McCorkell
Recommended By: /s/ Approved By: /s/
(Board Agent) Milo V. Price, Regional Director
10/20/82 Date: 10/20/82

* U.S. GOVERNMENT PRINTING OFFICE 1979-299-009

EXHIBIT 12

NATIONAL LABOR RELATIONS BOARD

REGION 28

3030 North Central Avenue

Phoenix, Arizona 85012

Telephone: (602) 241-2373

Resident Offices:

Patio Plaza Building
5000 Marble Avenue NE
Albuquerque, New Mexico 87110
Telephone (505) 766-2508

First National Building, Suite 602
109 North Oregon Street
El Paso, Texas 79901
Telephone (915) 541-7737

October 19, 1982

Mr. Adelicio G. Herrera
Route 5, Box 5329
Albuquerque, N.M . 87123

Re: Jencor International Corporation
Case 28-CA-7103

Dear Mr. Herrera:

The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation it does not appear that further proceedings on the charge are warranted, inasmuch as the evidence disclosed by the investigation is insufficient to establish that the Employer failed or refused to hire you because of your union or protected concerted activities. Rather, the evidence indicates that you were not hired because the Employer did not believe that you would fit in with its new operation. I am, therefore, refusing to issue a complaint on this allegation of the charge. With regard to the remainder of your charge, alleging violations of Section 8(a)(1), (2) and (3) of the Act in the Employer's allegedly premature signing of a collective-bargaining agreement containing a union-security clause, a complaint

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and Notice of Hearing issued in that matter on October 15, 1982.

Very truly yours,

/s/

Milo V. Price
Regional Director

Enclosures: Form NLRB-4767
From NLRB-4938

CERTIFIED MAIL 565,855
RETURN RECEIPT REQUESTED

cc: See attached page.

Jencor International Corporation
245 Woodward Road, S.E.
Albuquerque, NM 87103

Wayne Bingham, Esq.
Matthews, Crider, Jeffries, Calvert & Bingham
3908 Carlisle Boulevard, N.E.
Albuquerque, NM 87107

General Counsel
National Labor Relations Board
Washington, DC 20570

Albuquerque Resident Office
5000 Marble Avenue, N.E.
Albuquerque, NM 87110

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EXHIBIT 13

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570

November 4, 1982

Re: Jencor Int'l Corp.
Case No. 28-CA-7103

Mr. Adelicio G. Herrera
Route 5, Box 5329
Albuquerque, New Mexico 87123

Dear Mr. Herrera:

Your appeal from the Regional Director's partial refusal to issue complaint in the captioned case has been duly considered.

The appeal is denied substantially for the reasons set forth in the Regional Director's letter of October 19, 1982. Accordingly, further proceedings herein were deemed unwarranted.

Very truly yours,

William A. Lubbers
General Counsel

By /s/
Mary M. Shanklin
Director
Office of Appeals

cc: Director, Regional 28
Jencor Int'l Corp., 245 Woodward Road, SE.,
Albuquerque, New Mexico 87103
Wayne Bingham, Esq., Matthews, Crider, Jeffries,
Calvert & Bingham, 3908 Carlisle Blvd., N.E.,
Albuquerque, New Mexico 87107
Albuquerque Resident Office, 5000 Marble Ave., NE.,
Albuquerque, New Mexico 87110